



## City Council Report

915 I Street, 1<sup>st</sup> Floor  
Sacramento, CA 95814

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**File #:** 2016-01206

**Consent Item 12**

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**Title: Contract: Chemical Root Control (Published for 10-Day Review 10/20/2016)**

**Recommendation:** Pass a Motion 1) adopting the findings of fact issued by the bid protest hearing examiner, 2) adopting the hearing examiner's recommendation to reject the bid of Root Tamers as non-responsive, and 3) awarding the contract for Chemical Root Control to Duke's Root Control, for an amount not-to-exceed \$1,049,753.

**Location:** Citywide

**Contact:** Michael Malone, Operations Manager, (916) 808-6226; Rebecca Lane, Program Manager, (916) 808-1343; Stacy Larkin, Administrative Technician, (916) 808-6356, Department of Utilities

**Presenter:** None

**Department:** Utilities

**Attachments:**

1-Description/Analysis

2-Decision

3-Agreement

## Description/Analysis

**Issue Detail:** The Department of Utilities (DOU) recommends awarding a contract for the Chemical Root Control Project, to treat a total of approximately 200 miles of pipe within the City's sanitary sewer system with an herbicide to assist in the reduction of root-related issues within the collection system. This project is a continuation of efforts previously commenced in accordance with the California Sportfishing Protection Alliance's Consent Decree with the City of Sacramento (City).

**Policy Considerations:** The requested action is in conformance with City Code provisions for the award of competitively-bid contracts to the lowest responsible and responsive bidder. Based on the determination and recommendation of an independent bid protest hearing examiner, this report recommends rejecting the low bidder as non-responsive, and awarding the contract to the second low bidder (Duke's Root Control) as the lowest responsible and responsive bidder. (See discussion under "Bid Protest", below, for more detail.)

**Economic Impacts:** Not applicable.

## Environmental Considerations:

**California Environmental Quality Act (CEQA):** The Community Development Department, Environmental Services Manager has determined that the proposed action is exempt from the California Environmental Quality Act (CEQA) under Section 15301(b) of the CEQA Guidelines, which covers the maintenance of existing utility facilities with no expansion of use.

**Sustainability:** The project is consistent with the City's Sustainability Master Plan by improving infrastructure reliability, which will reduce energy-intensive maintenance efforts.

**Commission/Committee Action:** Not applicable.

**Rationale for Recommendation:** On April 26, 2016, DOU issued Invitation for Bid (IFB) B16141421044 for Chemical Root Control. The project was publicly advertised and three bids were received and opened on May 11, 2016. Root Tamers, Inc. was the low bidder, with a bid amount of \$1,033,194.23. Duke's Root Control (Duke's) was the second low bidder at \$1,049,753.01.

**Bid Protest:***DIR Registration Requirement and Bid Protest*

The Invitation for Bid included notice of the requirement for all contractors bidding on the Project to be currently registered with the California Department of Industrial Relations (DIR) pursuant to California Labor Code Section 1725.5. (Contractors bidding or performing public works contracts are required to register with DIR and pay a fee, with fee revenues used to fund state administration and enforcement of public works laws.) The Invitation for Bid also stated that any bid received from a contractor not currently registered with the DIR would be rejected as non-responsive.

After bids were received and opened, as part of its bid review process City staff checked the on-line DIR database and did not find any DIR registration for Root Tamers. On this basis, staff notified Root Tamers by letter that Root Tamers' bid was rejected as non-responsive. On the same date, the City notified Duke's by letter that Duke's was the apparent low bidder and would be recommended to the City Council for contract award.

Upon receiving the City's letter, Root Tamers contacted City staff and indicated that Root Tamers had continuously held a valid DIR registration since October 16, 2015, which was registered under the name of Todd Horne Gayman as a sole proprietorship doing business as (DBA) Root Tamers. Root Tamers also informed City staff that (a) Root Tamers had changed its company structure from a sole proprietorship to a corporation (Root Tamers, Inc.), and (b) prior to submitting its bid for the Project, Root Tamers contacted the DIR and was advised by the DIR to leave its existing registration in place until it expired June 30, 2016, then register as a corporation for the new fiscal year beginning July 1, 2016.

City staff reviewed DIR's online database and confirmed that there was a valid DIR registration, as of bid opening, registered under the name of Todd Horne Gayman as a Sole Proprietor DBA Root Tamers. Based on this additional information, City staff determined that Root Tamers did, in fact, possess a current DIR registration at bid opening, as required under the California Labor Code, and changed its initial determination that the Root Tamers bid was non-responsive, to a determination that its bid was responsive. The City subsequently sent Duke's a letter retracting the City's prior letter which stated that Duke's would be recommended for contract award as the apparent low bidder, and sent a letter to Root Tamers notifying Root Tamers of the City's revised recommendation for contract award to Root Tamers.

Duke's filed a timely bid protest contending that: (a) Root Tamers' bid was non-responsive because Root Tamers, Inc. did not possess a valid DIR contractor registration at the time bids

were received and opened; (b) the valid DIR registration that existed for the sole proprietorship DBA Root Tamers did not fulfill the DIR registration requirement, because Mr. Gayman submitted his bid for the Project as a corporate entity (Root Tamers, Inc.), and not under his sole proprietorship; and (c) the DIR registration for Mr. Gayman's sole proprietorship did not apply to Root Tamers, Inc., because a corporation is a separate legal entity that exists separately from its shareholders or owners.

### *Bid Protest Hearing and Hearing Examiner Decision*

In accordance with the City's bid protest procedures, a bid protest hearing was scheduled before an independent hearing examiner at the Institute for Administrative Justice at McGeorge Law School. Following the hearing, the hearing examiner issued a written decision setting forth the hearing examiner's findings of fact and conclusions of law, and a recommended determination of the bid protest based on the hearing examiner's findings and conclusions. A copy of the hearing examiner's September 2, 2016, decision is provided as Attachment 2.

In summary, the hearing examiner determined that the City should not have found Root Tamers' bid to be responsive because Root Tamers, Inc. did not have a DIR registration when its bid was opened, and that the City did not have authority to waive this as a minor bid irregularity, under the State law which created the DIR registration requirement. For these reasons, the hearing examiner recommended that the contract be awarded to Duke's.

### *City Council Options*

Under Section 3.60.540 of the City Code, the City Council may in its discretion take any of the following actions on the bid protest:

- A. Adopt the findings of fact issued by the hearing examiner, without hearing factual evidence from any party; or
- B. Review the recording of the hearing, or a transcript, prior to adopting or rejecting, in whole or in part, the findings of fact issued by the hearing examiner, without hearing factual evidence from any party; or
- C. In addition to or in lieu of reviewing the recording or a transcript of the hearing, hear factual evidence from any party prior to adopting or rejecting, in whole or in part, the findings of fact issued by the hearing examiner.

*Staff Recommendation*

City staff concurs with the hearing examiner’s findings and recommendation, and recommends that the City Council adopt the findings of fact issued by the hearing examiner and the hearing examiner’s recommendation to reject the bid of Root Tamers as non-responsive, and award the contract to Duke’s Root Control as the lowest responsive bidder.

**Financial Considerations:** The estimated total cost of the project is an amount not-to-exceed \$1,049,753. Sufficient funds are available in the Root Control Program Multi-Year Operating Project, Project No. I14110109, to award the contract and complete the project.

**Local Business Enterprise (LBE):** A waiver of the City’s minimum LBE participation requirement was approved prior to bidding because there are insufficient local firms that provide these services, and there are no subcontracting opportunities. No LBEs bid the project.

**Background:** The Consent Decree between the City and the California Sportfishing Protection Alliance (CSPA) specifies maintenance service targets to reduce sanitary sewer overflows, and includes implementation of a Chemical Root Control Program.

Initial treatment occurred in FY 2013-2014, and the sanitary sewer system is now ready for a second application.

The project was advertised as a Contract for Nonprofessional Services bid on April 26, 2016 and opened on May 11, 2016. Three bids were received from the firms as shown below:

<b>Contractor</b>	<b>Bid Amount</b>
Root Tamers, Inc.*	\$1,033,194.23
Duke’s Root Control	\$1,049,753.01
Pacific Sewer Maintenance	\$1,545,995.81

\* Non-responsive bid

September 2, 2016

~Sent via U.S. Mail and Email~

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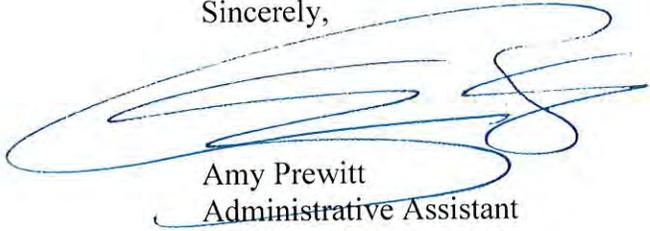
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RE: Decision on Administrative Appeal with Finding of Fact  
and Recommended Determination Bid Protest Hearing  
Duke's Root Control, Inc. v. Root Tamers, Inc. and City of Sacramento  
Case: Bid Number: B16141421044

Dear Ms. Zakrajsek:

Enclosed please find the Decision on Administrative Appeal with Finding of Fact and Recommended Determination from Hearing Examiner Kamardeep Athwal. This administrative hearing was held on July 25, 2016.

Sincerely,



Amy Prewitt  
Administrative Assistant

Enclosure

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 MCGEORGE SCHOOL OF LAW  
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**CITY OF SACRAMENTO  
 BID PROTEST HEARING**

In the matter of:	)	
	)	
DUKE’S ROOT CONTROL, INC.,	)	Case: Bid Number B16141421044
Protesting Bidder	)	
	)	
v.	)	<b>DECISION ON ADMINISTRATIVE    APPEAL WITH FINDING OF FACT    AND RECOMMENDED    DETERMINATION</b>
	)	
ROOT TAMERS, INC.,	)	
Protested Bidder	)	
	)	
and	)	
	)	
CITY OF SACRAMENTO,	)	
Awarding Agency	)	

**I. INTRODUCTION**

The bid protest by Duke’s Root Control, Inc. (Duke’s) concerning the City of Sacramento’s award of the Chemical Root Control Services contract, Bid Number B16141421044, to Root Tamers, Inc. (Root Tamers) was heard before Kamardeep Athwal, Hearing Examiner for the Institute for Administrative Justice, University of the Pacific, McGeorge School of Law, on July 25, 2016, in Sacramento, California.<sup>1</sup>

**II. APPEARANCES**

Tom Edwards, Pacific Regional Manager of Duke’s, appeared on behalf of the protesting bidder, Duke’s. Joe Robinson, Senior Deputy City Attorney, appeared on behalf of the awarding agency, City of Sacramento (City). Todd Gayman appeared on behalf of the protested bidder, Root Tamers. Also present on behalf of the City was Stacy Larkin, Department of Utilities Administrative Technician. The City submitted their Response to Bid Protest with Exhibits A-G. No other documentary evidence was submitted. Testimony was given by Mr. Edwards, Ms. Larkin, and Mr. Gayman. The record was closed at the conclusion of the hearing.

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<sup>1</sup> The impartial hearing examiner was appointed pursuant to Sacramento City Code section 3.60.520.

### **III. JURISDICTION AND SCOPE OF REVIEW**

Section 3.60.520 of the Sacramento City Code (SCC) sets forth the procedures for bid protest hearings before a hearing examiner appointed by the city council. The protesting bidder has the burden of showing the existence of all facts necessary to support the bid protest. The hearing examiner shall issue a written decision that includes findings of fact and a recommended determination of the bid protest based upon those findings of fact. Section 3.60.530 provides that after the hearing examiner issues a decision, the city council shall consider the protest at a public meeting. The council may hear the bid protest as part of the council's consideration of the award of the contract to which the bid relates, or it may hear the bid protest as a separate item. Section 3.60.540 states that "[t]he scope of the bid protest considered by the city council shall be limited to the issues and evidence set forth in the bid protest." The section lists various procedures that the City may exercise, in its discretion, before taking final action on the bid protest.

### **IV. ISSUE PRESENTED FOR HEARING**

1. Did Root Tamers and the City follow proper bid protest procedures?
2. Did the City err by finding that Root Tamers is a responsive bidder?

### **V. BACKGROUND**

On April 26, 2016, after rejecting all bids in January 2016 and again in March 2016, the City issued its third Invitation for Bid (IFB), Bid Number B16141421044, for chemical root control services (Exhibit B). The City received three bids in response to the third IFB. On May 11, 2016, the City Clerk opened the bids; Root Tamers was the lowest bidder and Duke's was the second lowest bidder.

California Labor Code section 1725.5 requires all contractors bidding on or performing work on any public services contract be currently registered with the California Department of Industrial Relations (DIR). When Ms. Larkin searched DIR's online contractor registration database for the name "Root Tamers, Inc.," she found no corresponding DIR registration. On May 17, 2016, Ms. Larkin notified Root Tamers that its bid had been deemed non-responsive because they did not possess a current DIR registration number at the time of bid opening (Exhibit C). That same day, Ms. Larkin notified Duke's that it appeared to be the lowest bidder and, as such, Duke's would be recommended to City Council for contract award (Exhibit D).

Ms. Larkin testified that Laura Gayman of Root Tamers contacted her shortly after receiving notice that Root Tamers had been deemed non-responsive and provided the DIR registration number associated with Root Tamers' business. Ms. Larkin testified she searched DIR's online contractor registration database by registration number and found a DIR contractor registration for a sole proprietorship under the name Todd Horne Gayman, DBA (doing business as) Root Tamers. Root Tamers asserts their DIR registration has been in place since November 16, 2015. Mr. Gayman testified that Root Tamers had changed their business from a sole proprietorship to a corporation in December 2015. Mr. Gayman testified that prior to submitting their bid for the IFB, his wife/secretary telephoned the DIR and was advised by DIR staff that Root Tamers should leave its existing registration in place until its expiration on June 30, 2016,

and then to register as a corporation for the new fiscal year beginning July 1, 2016 (Exhibit G). Upon receiving the notice of rejection from the City, Root Tamers immediately requested and received a new DIR registration number for Root Tamers as a corporation (Exhibits E, G). The DIR registration for Root Tamers as a corporation took effect May 18, 2016 (Exhibit G). Per Ms. Larkin's letter to Duke's on May 20, 2016, the DIR online contractor database reflected two valid registrations for Root Tamers, one as a sole proprietorship and one as a corporation (Exhibit E). In that same letter, Duke's was notified that the City's initial determination that Root Tamers bid was non-responsive had been retracted and Root Tamers would be recommended to City Council for contract award (Exhibit E). On May 25, 2016, Duke's filed a bid protest arguing the City did not follow its own bid protest procedures and that Root Tamers did not have a current DIR registration at bid submission as required by the IFB (Exhibit A).

## VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

### Issue 1: Did Root Tamers and the City follow proper bid protest procedures?

Duke's argues that the information Root Tamers provided to City staff immediately after Root Tamers received the initial notice of non-responsiveness should be treated as an invalid formal bid protest. The City argued, and included a statement in the IFB that "[t]he City reserves the right to waive any informalities or minor irregularities, as determined in its sole discretion, in connection with bids received." (Exhibit B, p. 7).

The IFB also stated, "[b]id protests must be filled [*sic*] and maintained in accordance with the provisions of Sections 3.60.460 through 3.60.560 of the Sacramento County Code. Bid protests that do not comply with Sections 3.60.460 through 3.60.560 . . . shall be invalid and shall not be considered." Furthermore, "the term 'bid protest' includes any bid protest that . . . (2) contests a City staff recommendation to award this contract to a particular bidder; or (3) contests a City staff recommendation to disqualify or reject one or more bidders on this contract."

After receiving notice from the City that Root Tamers was found non-responsive because they had no current DIR registration, Root Tamers immediately notified the City that an error had been made and supplied their DIR registration number that they asserted was current when their bid was submitted. Assuming Root Tamers did have a current DIR registration, the City's decision to classify their recall of a staff recommendation after allowing Root Tamers to submit their DIR number is an informality that does not require the City to follow formal bid protest procedures as it was not an abuse of discretion, did not affect the amount of the bid, and did not give Root Tamers an advantage or benefit not allowed to other bidders. Furthermore, per SCC section 3.60.020(B), "[w]here any provision . . . requires competitive bidding and award of the contract for a public project to the lowest responsible bidder, the lowest responsible bidder shall be determined as follows: . . . [¶¶] The adoption and use of standard minimum qualification s shall not in any way limit or affect the city's ability to: (1) review information contained in a bid, and additional relevant information, and determine whether the bidder is a responsive or responsible bidder . . . ."

Accordingly, the City did not violate its own bid protest procedures.

## **Issue 2: Did the City err by finding Root Tamers' bid responsive?**

Duke's argues that Root Tamers' bid is non-responsive because Root Tamers, Inc. was not registered with the DIR prior to submitting a bid for the contract as required by California Labor Code section 1725.5. The City and Root Tamers argue that Root Tamers had a current DIR registration when Root Tamers' bid was submitted; however, it was just registered under Todd Horne Gayman, DBA Root Tamers, a sole proprietorship. In the alternative, the City argues the fact that Root Tamers' DIR registration was for a sole proprietorship and not for Root Tamers, Inc., a corporation, is a minor irregularity that the City has discretion to waive.

Per Labor Code section 1725.5, "[a] contractor shall be registered pursuant to this section to be qualified to bid on, be listed in a bid proposal . . . ." Per Labor Code section 1722.1, "'contractor' and 'subcontractor' include a contractor, subcontractor, licensee, officer, agent, or representative thereof, acting in that capacity, when working on public works pursuant to this article . . . ." Furthermore, there is pending legislation to amend Section 1722.1 to further clarify that a "contractor" refers to the person with authority to bind their business in a contract and not a person required to have a contractor's license pursuant to the Contractors' State License Law.<sup>2</sup>

The City did not dispute that a contractor is required to be registered with the DIR prior to bid submission. Furthermore, the City demonstrated when it rejected Root Tamers' bid that it agrees a contractor that is not registered with the DIR pursuant to Labor Code section 1725.5 prior to submitting a bid is a non-responsive bidder and the bid must be rejected pursuant to Labor Code section 1771.1 (Exhibit C).

### **Was Root Tamers' DIR Registration Current?**

Mr. Gayman argues Root Tamers' registration was current; furthermore, he testified that Laura Gayman was advised by the DIR that Root Tamers did not need to register the corporation until the next fiscal year when the registration for the sole proprietorship expired (Exhibit G). Mr. Gayman presented no evidence to corroborate his assertion. Mr. Gayman testified that in December 2015, Root Tamers ceased doing business as a sole proprietorship and was incorporated; and, referring to the DIR registration, testified, "maybe some things slipped through the cracks."

Ms. Larkin, in the City's May 20, 2016, notice to Duke's wrote, "[a]fter sending our May 17, 2016 Notice, City staff was provided information showing that Root Tamers has continuously had a valid Department of Industrial Relations Registration Number since November 16, 2015." Furthermore, "Root Tamers changed from a Sole Proprietorship to a corporation, and prior to the submission of bids for the above contract Root Tamers was advised by the California DIR to leave its existing registration in place until it expired June 30, 2016, then register as a corporation for the new fiscal year beginning July 2, 2016. Upon receiving the City's May 17, 2016 notice of rejection, Root Tamers asked the DIR to register Root Tamers as a

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<sup>2</sup> This bill would provide that a person is a "contractor" or "subcontractor" for the purposes of those requirements regardless of whether the person is subject to the requirements of the Contractors' State License Law. This bill would provide that an agreement with a contractor or a subcontractor to perform a public work is a "contract" or "subcontract" for the purposes of requirements regarding the payment of prevailing wages described above.

corporation immediately, which DIR did, so there are currently two DIR registrations for Root Tamers. ¶ Given this additional information, which City staff has confirmed as accurate, City staff has changed its initial determination that the Root Tamers bid was non-responsive, and we are retracting our May 17, 2016 Notice. Because Root Tamers did possess a current DIR Registration Number at bid opening, as required under the California Labor Code, their bid is responsive.” Ms. Larkin testified that she found a DIR registration for the sole proprietorship after Ms. Gayman provided her with the corresponding DIR registration number; furthermore, Ms. Gayman provided a printout from the DIR website showing the corporation was registered on May 18, 2016, and that registration expired on June 30, 2016. The City conceded that they were not given any evidence that the DIR advised Root Tamers not to register as a corporation until the sole proprietorship registration expired.

Per Labor Code section 5, “[u]nless the context otherwise requires, the general provisions hereinafter set forth shall govern the construction of this code. Per Labor Code § 15, “shall” is mandatory and “may” is permissive.

Per Labor Code section 1771.1(a), “[a] contractor or subcontractor shall not be qualified to bid on, be listed in a bid proposal, subject to the requirements of Section 4104 of the Public Contract Code, or engage in the performance of any contract for public work, as defined in this chapter, unless currently registered and qualified to perform public work pursuant to Section 1725.5.” Per Section 1771.1(b), “[n]otice of the requirement described in subdivision (a) shall be included in all bid invitations and public works contracts, and a bid shall not be accepted nor any contract or subcontract entered into without proof of the contractor or subcontractor’s current registration to perform public work pursuant to Section 1725.5.” Furthermore, Section 1771.1(e) states, “[t]he department shall maintain on its Internet Web site a list of contractors who are currently registered to perform public work pursuant to Section 1725.5.”

Root Tamers argues their DIR registration was current when their bid was submitted to the City; however, at that time there was no separate registration for Root Tamers, Inc. Duke’s argues that Root Tamers was not registered with the DIR because Root Tamers is not the same as the sole proprietorship. Duke’s argument is persuasive. Per *Providence Washington Ins. Co. v. Valley Forge Ins. Co.*, 42 Cal.App.4th 1194, 1200, quoting Friedman, Cal.Practice Guide: Corporations 1 (1995), “[a] sole proprietorship is not a legal entity itself. Rather, the term refers to a natural person who directly owns the business . . . .” Duke’s argued Mr. Gayman, an individual, did not submit the bid, Root Tamers, a corporation submitted the bid. Duke’s cited *Grosset v. Wenaas*, 42 Cal.4th 1100, 1008 (2008), which states, “[i]t is fundamental that a corporation is a legal entity that exists separately from its shareholders.” While the facts in *Grosset* are not on point, Duke’s argument is persuasive. The DIR registration for the sole proprietorship was simply a registration for Mr. Gayman to personally contract for public works projects, not a registration for a corporation. Furthermore, Mr. Gayman testified there was no DIR registration in place for the corporation until after the bid had been submitted.

The Labor Code does not define current, so the plain language meaning is used. Per the online Merriam-Webster’s Learner’s Dictionary, “current” is defined as “happening or existing now: belonging to or existing in the present time.” Mr. Gayman testified that Todd Horne Gayman DBA Root Tamers, a sole proprietorship, was dissolved in December 2015. Therefore,

that business was not current and its DIR registration could not have been not current, because, as Mr. Gayman testified, there was no business associated with that registration. The fact that there was still a listing on the DIR website for the sole proprietorship is not evidence of a current registration for Root Tamers, the corporation.

### **Did the City have discretion to waive Root Tamers' late DIR registration?**

Duke's compared Root Tamers' reliance on bad information from DIR staff to a taxpayer receiving bad advice from Internal Revenue Service staff to the taxpayer's detriment. However, that analogy will not be analyzed here, because, lacking any corroborating evidence and Mr. Gayman's testimony that his staff "dropped the ball," Root Tamers' assertion that the DIR advised them to not register the corporation until the registration for the sole proprietorship expired lacks credibility and will not be considered.

The City argued, under California case law, bid responsiveness considerations "must be evaluated from a practical rather than a hypothetical standpoint, with reference to the factual circumstances of the case." *Ghilotti Construction Company v. City of Richmond*, 45 Cal.App.4th 897, 908-909 (1996). These considerations are to be viewed from the perspective of the public interest, and not the private interests of a disappointed bidder. *Id.* The interests of the public do not favor cancelling a low bid at the behest of a losing bidder based on minor technicalities raised after the fact. *Ghilotti*, 45 Cal.App.4th at 908-909 (quoting *Judson Pacific-Murphy Corp. v. Durkee*, 144 Cal.App.2d 377, 383 (1956)). The City argued that Root Tamers' sole proprietorship registration qualified as a current registration with the DIR when the bid was submitted and, in the alternative, registering as a corporation after the bid was submitted was an informality or minor irregularity that the City could waive per *Ghilotti* and Sacramento City Code section 3.56.160. Ms. Larkin testified that letting Root Tamers register after bid submission was a minor irregularity because doing so did not give Root Tamers an unfair advantage or affect the bid amount.

The Court wrote in *Subsequent Injuries Fund v. Industrial Acc. Comm.*, 39 Cal.2d 83, 91, 244 P.2d 889, "[t]he Labor Code must be liberally construed to effect its beneficent purposes . . . . [b]ut liberal construction does not justify writing into the statute a provision which is not to be found therein even by the most liberal reading of its terms." Labor Code section 1725.5 states, "[a] contractor shall be registered pursuant to this section to be qualified to bid on . . . any public work contract that is subject to the requirements of this chapter." As noted above, Root Tamers was not registered with the DIR when they submitted their bid; thus they were not qualified to bid on the IFB. The City argued allowing Root Tamers to register after bid submission was a waivable, minor irregularity. However, Labor Code section 1771.1(a) states, "[a] contractor or subcontractor shall not be qualified to bid on, be listed in a bid proposal . . . ." any contract for public work, as defined in this chapter, unless currently registered and qualified to perform public work pursuant to Section 1725.5." Furthermore, Section 1771.1 lists exceptions that allow correction for errors related to listing an unregistered *subcontractor*, provided the subcontractor is registered prior to bid opening, or within 24 hours after bid opening, provided they paid the penalty registration fee, or the subcontractor is replaced by another registered subcontractor; no allowances were included to allow a contractor to register with the DIR after submitting a bid for a public work contract.

Per Section 1771.1(f), “[a] contract entered into with any contractor or subcontractor in violation of subdivision (a) shall be subject to cancellation, provided that a contract for public work shall not be unlawful, void, or voidable solely due to the failure of the awarding body, contractor, or any subcontractor to comply with the requirements of Section 1725.5 or this section.”

Labor Code section 1725.5 is clear that a bid must not even be submitted or accepted if the submitting contractor does not have a current DIR registration. Section 1771.1(f) allows an awarding body to cancel an awarded contract that is determined to be a public work contract after the bid was submitted or a contract was entered into. The City has already demonstrated it will not accept a bid from a contractor without a current DIR registration when Ms. Larkin notified Root Tamers on May 17, 2016, that its bid had been deemed non-responsive because they did not possess a current DIR registration number at the time of bid opening (Exhibit C). Furthermore, Root Tamers did not have a current DIR registration when they submitted their bid in response to the IFB, as stated above.

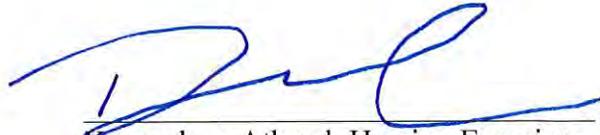
Accordingly, the City erred in finding Root Tamers a responsive bidder when they relied on Root Tamers’ assertion that the DIR advised Root Tamers that they did not need to register their corporation until the registration for their sole proprietorship expired.

The City argued, even assuming *arguendo* that not being registered as Root Tamers, Inc. at the time bids were opened rendered the bid non-responsive, the City Council may waive minor irregularities in a bid in awarding a contract. Citing *Konica Business Machines, U.S.A., Inc. v. Regents*, 206 Cal. App.3d 449, 454 (1988) (citations omitted), the City argued a bid may be accepted when not completely responsive to bid specifications if the bid substantially conforms to the specifications, and if the variance could not have affected the amount of the bid, or given the bidder competitive advantage over other bidders. However, the legislature worded Labor Code section 1725.5 clearly making registration with the DIR a threshold condition that was not waivable. Additionally, in *DeSilva Gates Construction, LP v. Department of Transportation*, 242 Cal.App.4th 1409 (2015), the court found California Department of Transportation (CalTrans) abused its discretion by declaring a bid nonresponsive and then waiving that bidder’s mistake. Quoting *Ghilotti*, the court stated their function was to “decide whether the public entity’s decision is supported by substantial evidence. Our review is limited to an examination of the proceedings to determine whether the [public agency]’s actions were arbitrary, capricious, entirely lacking in evidentiary support, or inconsistent with proper procedure. There is a presumption that the [public agency]’s actions were supported by substantial evidence.” (*Id.* 1417, 1418) Here, the City found Root Tamers’ bid nonresponsive, the City waived that defect by allowing Root Tamers to correct that defect, thereby giving Root Tamers an advantage over the other bidders. The City had already demonstrated failure to be registered with the DIR was a material defect when Ms. Larkin notified Root Tamers on May 17, 2016, that its bid had been deemed non-responsive because they did not possess a current DIR registration number at the time of bid opening (Exhibit C). In *DeSilva*, the court concluded the awarding agency “abused its discretion by waiving a material defect . . .” giving one bidder an advantage over another, which was an error. (*DeSilva*, 1424). Accordingly, when the City allowed Root Tamers, contrary to Labor Code section 1725.5, to register with the DIR after bid submission, the City abused its discretion and gave Root Tamers an advantage other bidders did not have.

## VII. RECOMMENDED DETERMINATION

The Hearing Examiner finds that the City erred in finding Root Tamers a responsive bidder. The Hearing Examiner recommends that the contract for Chemical Root Control, IFB number B16141421044, be awarded to Duke's.

Date: September 2, 2016



Kamardeep Athwal, Hearing Examiner  
Institute for Administrative Justice  
University of the Pacific  
McGeorge School of Law

## **PROOF OF SERVICE VIA EMAIL & U.S. MAIL**

I, Amy Prewitt, declare as follows:

I am employed in the County of Sacramento, California, the county where the mailing took place; I am over the age of 18 years and not a party to the within action. My business address is 3200 Fifth Avenue, Sacramento, California 95817. I am readily familiar with my employer's business practice for collection and processing of correspondence for mailing with the United States Postal Service.

On September 2, 2016 I served a copy of the following document:

**Decision on Administrative Appeal with Finding of Fact  
and Recommended Determination Bid Protest Hearing  
Duke's Root Control, Inc. v. Root Tamers, Inc. and City of Sacramento  
Case: Bid Number: B16141421044**

on the persons named below by following ordinary business practice, placing a true copy thereof enclosed in a sealed envelope for collection and mailing with the United States Postal Service where it would be deposited for first class delivery, postage fully prepaid, that same day in the ordinary course of business, and via email, addressed as follows:

Phyllis Zakrajsek  
Supervising Legal Secretary  
City of Sacramento  
951 I Street  
Sacramento, CA 95814  
[PZakrajsek@cityofsacramento.org](mailto:PZakrajsek@cityofsacramento.org)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on September 9, 2016, in Sacramento, California.

  
Amy Prewitt, Administrative Assistant  
Institute for Administrative Justice  
McGeorge School of Law

PROJECT #:  
PROJECT NAME: **CHEMICAL ROOT CONTROL**  
DEPARTMENT: **UTILITIES**  
DIVISION: **OPERATIONS AND MAINTENANCE**

CITY OF SACRAMENTO

**NONPROFESSIONAL SERVICES AGREEMENT**

**THIS AGREEMENT** is made at Sacramento, California, as of \_\_\_\_\_, by and between the **CITY OF SACRAMENTO**, a municipal corporation ("CITY"), and

*Duke's Root Control, Inc.*  
*1020 Hiawatha Blvd. West, Syracuse, NY 13204*  
*Phone: (315) 472-4781*

("CONTRACTOR"), who agree as follows:

1. **Contract.** The Contract shall consist of this Agreement and each of the following documents (if applicable), which are incorporated herein by reference:

Request for Proposals	Contractor's Bid Proposal Form
Instructions to Bidders	Workers' Compensation Certificate
Local Business Enterprise (LBE) Requirements	Certificate(s) of Insurance
Drug-Free Workplace Policy and Affidavit	Technical Specifications
Declaration of Compliance (Equal Benefits Ordinance)	
Declaration of Compliance (Living Wage Ordinance)	

2. **Services.** Subject to the terms and conditions set forth in this Agreement, CONTRACTOR shall provide to CITY the services described in Exhibit A. CONTRACTOR shall provide the services at the time, place, and in the manner specified in Exhibit A. CONTRACTOR shall not be compensated for services outside the scope of Exhibit A unless prior to the commencement of the services: (a) CONTRACTOR notifies CITY and CITY agrees that the services are outside the scope of Exhibit A; (b) CONTRACTOR estimates the additional compensation required for these additional services; and (c) CITY, after notice, approves in writing a Supplemental Agreement specifying the additional services and amount of compensation therefor. CITY shall have no obligations whatsoever under this Agreement or any Supplemental Agreement, unless and until this Agreement or any Supplemental Agreement is approved by the Sacramento City Manager or the City Manager's authorized designee, or by the Sacramento City Council, as required by the Sacramento City Code.
3. **Payment.** CITY shall pay CONTRACTOR for services rendered pursuant to this Agreement at the times and in the manner set forth in Exhibit B. The payments specified in Exhibit B shall be the only payments to be made to CONTRACTOR for the services rendered pursuant to this Agreement unless pursuant to Section 1, above, CITY approves additional compensation for additional services. CONTRACTOR shall submit all billings for services to CITY in the manner specified in

Exhibit B, or, if not specified in Exhibit B, according to the usual and customary procedures and practices that CONTRACTOR uses for billing clients similar to CITY.

4. **Facilities and Equipment.** Except as set forth in Exhibit C, CONTRACTOR shall, at its sole cost and expense, furnish all facilities and equipment that may be required for CONTRACTOR to perform services pursuant to this Agreement. CITY shall furnish to CONTRACTOR only the facilities and equipment listed in Exhibit C according to any terms and conditions set forth in Exhibit C.
5. **General Provisions.** The General Provisions set forth in Exhibit D, that include indemnity and insurance requirements, are part of this Agreement. In the event of any conflict between the General Provisions and any terms or conditions of any document prepared or provided by CONTRACTOR and made a part of this Agreement, including without limitation any document relating to the scope of services or payment therefor, the General Provisions shall control over those terms or conditions.
6. **Wage Requirements.** This Agreement is subject to the provisions of Sacramento City Code Chapter 3.58, Living Wage. The requirements of Sacramento City Code Chapter 3.58 are summarized in Exhibit E. The CONTRACTOR is required to sign the attached Declaration of Compliance (Living Wage Ordinance) to assure compliance with these requirements. In addition, for services that constitute "public works" under California Labor Code section 1720 et seq., payment of the prevailing rate of wages is required as indicated in Exhibit A, Section 4 of this Agreement. If both prevailing wage and living wage requirements apply, CONTRACTOR shall pay the higher of the two rates.
7. **Non-Discrimination in Employee Benefits.** This Agreement is subject to the provisions of Sacramento City Code Chapter 3.54, Non-Discrimination in Employee Benefits by City Contractors. The requirements of Sacramento City Code Chapter 3.54 are summarized in Exhibit F. CONTRACTOR is required to sign the attached Declaration of Compliance (Equal Benefits Ordinance), to assure compliance with these requirements.
8. **Authority.** The person signing this Agreement for CONTRACTOR represents and warrants that he/she is fully authorized to sign this Agreement on behalf of CONTRACTOR and to bind CONTRACTOR to the performance of its obligations hereunder.
9. **Exhibits.** All exhibits referred to herein are attached hereto and are by this reference incorporated as if set forth fully herein.

Executed as of the day and year first above stated.

**CITY OF SACRAMENTO**  
A Municipal Corporation

By: \_\_\_\_\_

Print name: \_\_\_\_\_

Title: \_\_\_\_\_

For: John F. Shirey, City Manager

ATTEST:

\_\_\_\_\_  
City Clerk

APPROVED AS TO FORM:

\_\_\_\_\_  
City Attorney

**Attachments**

- Exhibit A      Scope of Service
- Exhibit B      Fee Schedule/Manner of Payment
- Exhibit C      Facilities/Equipment Provided
- Exhibit D      General Provisions
- Exhibit E      Living Wage Requirements
- Exhibit F      Non-Discrimination in Employee Benefits

**CONTRACTOR:**

Duke's Root Control, Inc.

NAME OF FIRM

75-3026801

Federal I.D. No.

DIR Reg # 1000003539

State I.D. No.

1008494

City of Sacramento Business Op. Tax Cert. No.

TYPE OF BUSINESS ENTITY (*check one*):

- Individual/Sole Proprietor
- Partnership
- Corporation (*may require 2 signatures*)
- Limited Liability Company
- Other (*please specify: \_\_\_\_\_*)



\_\_\_\_\_  
Signature of Authorized Person

William J. Anderson, Vice President

Print Name and Title

\_\_\_\_\_  
Additional Signature (*if required*)

\_\_\_\_\_  
Print Name and Title

**DECLARATION OF COMPLIANCE**  
**Living Wage Ordinance**

Name of Contractor: DUKE'S ROOT CONTROL, INC.

Address: 1020 Hiawatha Blvd. West, Syracuse, NY 13204

The above-named contractor ("Contractor") hereby declares and agrees as follows:

1. Contractor has read and understands the Living Wage Requirements (the "Requirements") attached hereto as Exhibit E.
2. As a condition of receiving this Contract, Contractor agrees to fully comply with the Requirements, as well as any additional requirements that may be specified in the City of Sacramento's Living Wage Ordinance codified at Chapter 3.58 of the Sacramento City Code (the "Ordinance"). If required by the Ordinance, Contractor will pay not less than the minimum compensation specified in the Ordinance to Contractor's employees, for all time spent performing any work under this Contract.
3. If the amount of this Contract is less than \$100,000, as a condition of receiving this Contract, Contractor will notify the City of Sacramento ("City") in writing if the aggregate value of this Contract and of any other Nonprofessional Services contract(s) covered by the Ordinance that the City has awarded to Contractor within the previous 12 months, is \$100,000 or more.
4. Contractor acknowledges and agrees that the Requirements, the Ordinance and this Declaration shall constitute part of this Contract, and that these provisions shall govern in the event of any conflict with any other provisions of the Contract.
5. Contractor further acknowledges and agrees that any violation of the Requirements or the Ordinance constitutes a material breach of this Contract, and that, if such a breach occurs, the City will be authorized to terminate the Contract, and pursue all available legal and equitable remedies.
6. If requested by the City, Contractor will promptly submit certified payroll records to the City, for itself and/or for Contractor's subcontractor(s), as requested by the City, and Contractor will take any other steps as may be required by the City to determine whether Contractor's subcontractor(s) or Contractor have complied with the Requirements and the Ordinance.
7. Contractor will require all of its subcontractors who are covered by these requirements to comply with the Requirements and any additional requirements that may be specified in the Ordinance, and Contractor will include these requirements in all subcontracts covered by the Ordinance.
8. Contractor agrees to defend, indemnify and hold harmless the City, its officers and employees against any claims, actions, damages, costs (including reasonable attorney fees) or other liabilities of any kind arising from any violation of the Requirements or the Ordinance by Contractor or by any subcontractor retained to perform work or provide services under this Contract.

The undersigned declares under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that he or she is authorized to bind the Contractor to the provisions of this Declaration.

  
\_\_\_\_\_  
Signature of Authorized Representative

Date: October 12, 2016

Print name: William J. Anderson

Title: Vice President

**DECLARATION OF COMPLIANCE**  
**Equal Benefits Ordinance**

Name of Contractor: DUKE'S ROOT CONTROL, INC.

Address: 1020 Hiawatha Blvd. West, Syracuse, NY 13204

The above-named Contractor ("Contractor") hereby declares and agrees as follows:

1. Contractor has read and understands the Requirements of the Non-Discrimination In Employee Benefits Code (the "Requirements") attached hereto as Exhibit F.
2. As a condition of receiving this Contract, Contractor agrees to fully comply with the Requirements, as well as any additional requirements that may be specified in the City of Sacramento's Non-Discrimination In Employee Benefits Code codified at Chapter 3.54 of the Sacramento City Code (the "Ordinance").
3. Contractor understands, to the extent that such benefits are not preempted or prohibited by federal or state law, employee benefits covered by the Ordinance are any of the following:
  - a. Bereavement Leave
  - b. Disability, life, and other types of insurance
  - c. Family medical leave
  - d. Health benefits
  - e. Membership or membership discounts
  - f. Moving expenses
  - g. Pension and retirement benefits
  - h. Vacation
  - i. Travel benefits
  - j. Any other benefit offered to employees

Contractor agrees that if Contractor offers any of the above-listed employee benefits, Contractor will offer those benefits, without discrimination between employees with spouses and employees with domestic partners, and without discrimination between the spouses and domestic partners of such employees.

4. Contractor understands that Contractor will not be considered to be discriminating in the provision or application of employee benefits under the following conditions or circumstances:
  - a. If the actual cost of providing a benefit to a domestic partner or spouse exceeds the cost of providing the same benefit to a spouse or domestic partner of an employee, Contractor will not be required to provide the benefit, nor shall it be deemed discriminatory, if Contractor requires the employee to pay the monetary difference in order to provide the benefit to the domestic partner or to the spouse.

- b. If Contractor is unable to provide a certain benefit, despite taking reasonable measures to do so, if Contractor provides the employee with a cash equivalent Contractor will not be deemed to be discriminating in the application of that benefit.
  - c. If Contractor provides employee benefits neither to employee's spouses nor to employee's domestic partners.
  - d. If Contractor provides employee benefits to employees on a basis unrelated to marital or domestic partner status.
  - e. If Contractor submits written evidence of making reasonable efforts to end discrimination in employee benefits by implementing policies that will be enacted before the first effective date after the first open enrollment process following the date this Contract is executed by the City of Sacramento ("City"). Contractor understands that any delay in the implementation of such policies may not exceed one (1) year from the date this Contract is executed by the City, and applies only to those employee benefits for which an open enrollment process is applicable.
  - f. Until administrative steps can be taken to incorporate nondiscrimination in employee benefits. The time allotted for these administrative steps will apply only to those employee benefits for which administrative steps are necessary and may not exceed three (3) months from the date this Contract is executed by the City.
  - g. Until the expiration of a current collective bargaining agreement(s) if employee benefits are governed by such collective bargaining agreement(s).
  - h. Contractor takes all reasonable measures to end discrimination in employee benefits by either requesting that the union(s) involved agree to reopen the agreement(s) in order for Contractor to take whatever steps are necessary to end discrimination in employee benefits or by ending discrimination in employee benefits without reopening the collective bargaining agreement(s).
  - i. In the event Contractor cannot end discrimination in employee benefits despite taking all reasonable measures to do so, Contractor provides a cash equivalent to eligible employees for whom employee benefits, are not available. Unless otherwise authorized in writing by the City Manager, Contractor understands this cash equivalent must begin at the time the union(s) refuse to allow the collective bargaining agreement(s) to be reopened or not longer than three (3) months after the date this Contract is executed by the City.
5. Contractor understands that failure to comply with the provisions of Section 4(a) through 4(i), above, will subject Contractor to possible suspension and/or termination of this Contract for cause; repayment of any or all of the Contract amount disbursed by the City; debarment for future contracts until all penalties and restitution have been paid in full and/or for up to two (2) years; and/or the imposition of a penalty, payable to the City, in the sum of \$50.00 for each employee, for each calendar day during which the employee was discriminated against in violation of the provisions of the Ordinance.

6. Contractor understands and agrees to provide notice to each current employee and, within ten (10) days of hire, to each new employee, of their rights under the Ordinance. Contractor further agrees to maintain a copy of each such letter provided, in an appropriate file for inspection by authorized representatives of the City. Contractor also agrees to prominently display a poster informing each employee of these rights.
7. Contractor understands that Contractor has the right to request a waiver of, or exemption from, the provisions of the Ordinance by submitting a written request to the City's Procurement Services Division prior to Contract award, which request shall identify the provision(s) of the Ordinance authorizing such waiver or exemption and the factual basis for such waiver or exemption. The City shall determine in its sole discretion whether to approve any such request.
8. Contractor agrees to defend, indemnify and hold harmless, the City, its officers and employees, against any claims, actions, damages, costs (including reasonable attorney fees), or other liabilities of any kind arising from any violation of the Requirements or of the Ordinance by Contractor.

The undersigned declares under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that he or she is authorized to bind the Contractor to the provisions of this Declaration.



\_\_\_\_\_  
Signature of Authorized Representative

Date: October 12, 2016

Print name: William J. Anderson

Title: Vice President

**EXHIBIT A**

**NONPROFESSIONAL SERVICES AGREEMENT**

**SCOPE OF SERVICES**

**1. Representatives.**

The CITY Representative for this Agreement is:

*Rebecca Lane  
Department of Utilities  
1395 35<sup>th</sup> Avenue, Sacramento, CA 95822  
Phone: (916) 808-1343/rlane@cityofsacramento.org*

All CONTRACTOR questions pertaining to this Agreement shall be referred to the CITY Representative or the Representative's designee.

The CONTRACTOR Representative for this Agreement is:

*William Anderson, Vice President  
Duke's Root Control, Inc.  
1020 Hiawatha Blvd. West, Syracuse, NY 13204  
Phone: (315) 472-4781/bill@dukes.com*

All CITY questions pertaining to this Agreement shall be referred to the CONTRACTOR Representative. All correspondence to CONTRACTOR shall be addressed to the address or e-mail address set forth on page one of this Agreement. Unless otherwise provided in this Agreement, all correspondence to the CITY shall be addressed to the CITY Representative.

**2. Scope of Services.**

The services provided shall be as set forth in Attachment 1 to Exhibit A, attached hereto and incorporated herein.

**3. Time of Performance.** The services described herein shall be provided beginning upon contract approval through and including June 30, 2019.

**4. Prevailing Wage Requirement.** *[To be completed by the City Representative:]*

The services provided under this Agreement constitute "public works" under California Labor Code section 1720 *et seq.* and are either ***[check one if applicable]:***

\_\_\_\_\_ Construction work in an amount exceeding \$25,000; or

XXXXX Alteration, demolition, repair, or maintenance work in an amount exceeding \$15,000.

If either line is checked above, this Agreement is subject to the provisions of Sacramento City Code section 3.60.180 which requires, among other things, that CONTRACTOR pay not less than the prevailing rate of wages, as determined by the Director of the California Department of Industrial Relations pursuant to California Labor Code section 1773. If payment of the prevailing rate of wages is required, CONTRACTOR and every lower-tier subcontractor shall submit certified payrolls and labor compliance documentation electronically when and as required by CITY. CONTRACTOR is responsible for compliance with Sacramento City Code section 3.60.180, and shall include these requirements in every subcontract or subagreement. This Agreement is subject to compliance monitoring and enforcement by the California Department of Industrial Relations, as specified in California Labor Code section 1771.4.

## ATTACHMENT 1 TO EXHIBIT A

### SCOPE OF SERVICES

#### **1.01 Location, Scope of Work**

These Special Provisions cover the application of a chemical herbicide to approximately 100 miles (approximately 525,994 linear feet) of sanitary sewer pipe for the purpose of killing roots and inhibiting future root growth. Maps showing the locations of sewer pipes to be treated with the herbicide are located in the Appendix of these Special Provisions.

#### **1.02 Specifications**

The work to be performed under this contract shall be done in accordance with the Special Provisions contained herein. In these Special Provisions, reference is made to the Standard Specifications of the City of Sacramento, adopted June 2007 ("Standard Specifications"). The general requirements of this contract shall be governed by these Special Provisions first, followed by Sections 1 through 8 of the Standard Specifications. Other standards or specifications specified in these Special Provisions govern only the applicable technical specifications.

#### **1.03 Interpretation of Contract Documents**

Questions concerning the interpretation of any portion of the contract documents may be directed to Stacy Larkin, City of Sacramento, Department of Utilities, 1395 35th Ave, Sacramento, California, 95822, (916) 808-6356, slarkin@cityofsacramento.org. Interpretation, where necessary, will be made by the City in the form of an addendum to the contract documents and, when issued, will be sent as promptly as is practicable to all parties to whom the bid documents have been issued. All such addenda shall become part of the contract.

It shall be the Contractor's responsibility to call to the attention of the Program Manager any missing pages or drawings in the contract documents including the addenda.

#### **1.04 Proof of Compliance with Contract**

In order that the Program Manager may determine whether the Contractor has complied with the requirements of the contract documents not readily determinable through inspection and tests of equipment, work, or materials, the Contractor shall at any time when requested, at the Contractor's expense, submit to the Program Manager properly authenticated documents or other satisfactory proofs as to his/her compliance with such requirements.

#### **1.05 Shop Drawings & Submittals**

In accordance with Section 5-7 of the Standard Specifications, Contractor shall prepare and submit for review four (4) copies of the following items:

1. Work schedule (to be developed in coordination with the Department of Utilities Operations & Maintenance Planner/Scheduler, as set forth in 1.07, below)
2. Traffic control plan
3. Application log sheets (see Appendix; City to provide Log Sheet to be used in Excel format)
4. Chemical herbicide to be used and application parameters
5. Event Notification Form (see Appendix)

Contractor is advised that at the Program Manager's discretion, the above list may be expanded to include additional items to which Section 5-7 of the Standard Specifications will apply. Contractor shall keep one copy of the approved Traffic Control Plan at each work site at all times.

## **1.06 Period of Performance and Time of Completion**

Contractor shall commence performance of the work not later than five (5) calendar days after a contract is awarded by the Sacramento City Council (the "Start Date"), and the entire work shall be brought to completion in the manner provided for in the Contract on or before May 31, 2019 ("Completion Date") with all interim sub-completion dates (September 30, 2016, May 31, 2017, and May 31, 2018) being timely met. A working day is defined as any day except Sunday or a legal holiday.

Contractor shall pay liquidated damages to the City for failure to complete the entire work by the Completion Date (including sub-completion dates) in the amount of five hundred dollars (\$500.00) for each calendar day after the Completion Date and interim sub-completion dates, continuing to the time at which the entire Work is completed. Such amount is the actual cash value agreed upon by the City and Contractor as the loss to City and the public resulting from Contractor's default.

## **1.07 Project Scheduling**

The Contractor shall meet with the Department of Utilities Operations & Maintenance Planner/Scheduler to develop and submit a proposed detailed schedule of application prior to commencing any work activity. Such proposed schedule will set forth all items of work to be conducted with associated timelines. The proposed schedule shall include the appropriate sequencing of work activities as determined by and in conjunction with the Planner/Scheduler. The schedule shall be submitted, reviewed, and updated in accordance with Section 7-2 of the Standard Specifications. No progress payments will be made for work completed prior to acceptance of the schedule.

Following the initial planning session for Year One, Contractor shall meet with the Planner/Scheduler annually to coordinate that Year's treatment goals.

- Year One (to be completed by September 30, 2016) encompasses the geographic area set forth in the Map entitled "Citywide", and consists of approximately 100 miles of pipe; however, the order of pipes to be completed in Year One shall be as follows: (1) River Park-North Area, (2) Meadowview-Pocket Area, and (3) Hollywood Park-South Land Park Area, as set forth in the respectively named Maps contained in the Appendix.
- Year Two (to be completed by May 31, 2017) encompasses the geographic area as set forth in the Map entitled "River Park-North", and consists of approximately 30 miles of pipe.
- Year Three (to be completed by May 31, 2018) encompasses the geographic area as set forth in the Map entitled "Meadowview-Pocket", and consists of approximately 41 miles of pipe.
- Year Four (to be completed by May 31, 2019) encompasses the geographic area as set forth in the Map entitled "Hollywood Park-South Land Park", and consists of approximately 29 miles of pipe.

Contractor understands that each initial annual proposed Project Schedule, once accepted, remains fluid, and that the Schedule will be reviewed and evaluated with the Planner/Scheduler on a rolling weekly basis and potentially adjusted in order to efficiently address any external issues in addition to any internal workflow / coordination issues.

Contractor shall/will be able to perform all communications and information/document transmittal with electronic capability.

## **1.08 Application Log File**

Contractor shall use an Application Log which can be maintained, transmitted, and stored in electronic format (MS Excel file; the template Excel file to be used will be provided by the Planner/Scheduler), The Application Log shall document timely and accurate information regarding each pipe segment treated. A sample of the information required is provided in the Appendix of these Special Provisions. The information required may be modified as deemed appropriate by the Planner/Scheduler and/or Program Manager.

The Application Log shall be current (daily), subject to inspection by the Planner/Scheduler and/or Program Manager at any time, and submitted to the Planner/Scheduler daily by 3:00 p.m. (for the prior day's work activity) via email. Progress payments, or portions thereof, may be withheld if the Application Log is not submitted as required or if the information contained therein is deficient.

The Contractor shall maintain copies of the submitted Application Log for a period of three years following the Completion Date for purposes of back-up information.

### **1.09 Public Notification**

Notifications and arrangements with the owners and/or tenants of each private property for which encroachment will be necessary will be done in partnership between the Contractor and the City. Contractor shall identify parcels needing encroachment, including but not limited to such details as the estimated length of time for each encroachment. The City, through its Planner/Scheduler and field staff, will begin the notification process in advance of work. Planner/Scheduler will then coordinate with Contractor, during the weekly scheduling coordination process, the adjusted scheduled application dates and, if necessary, times of encroachment, and Contractor's notification activity via door hanger provided by the City. Contractor shall add the following information to the City-provided door hanger (Avery-style label):

- Name and 24-hour phone number(s) of Contractor
- Approximate date work will be performed

Contractor shall also properly complete and submit an Event Notification Form to the Sacramento Regional County Sanitation District and provide a copy to the Program Manager. A copy of the Notification is located in the Appendix of these Special Provisions.

### **1.10 Materials and Equipment**

Contractor is responsible for the care and protection of all materials and equipment until the completion and final acceptance of the work, in accordance with Section 5 of the Standard Specifications and these Special Provisions.

### **1.11 Administrative Penalty Ordinance**

Contractor shall become familiar with Chapter 12.20 of the City Code which contains minimum requirements and restrictions relating to construction activities within the City right of way and establishes administrative penalties for non-compliance of these requirements. The Contractor may be assessed the administrative penalty for each violation of any provision addressed by the ordinance, unless modified herein, and amounts can be deducted from the Contract. The ordinance includes the following general categories:

- Working hours for the City's "Primary Streets"
- Traffic control plan requirements
- Access to private property
- Maintenance of construction areas
- Maintenance of traffic, public safety and convenience
- Repair of traffic control systems
- Care of existing known facilities
- Protection of existing improvements
- Public notification
- Noise levels

Copies of the ordinance are available from the City Clerk's Office, 915 I Street, Sacramento, California 95814, and at [www.cityofsacramento.org](http://www.cityofsacramento.org).

### **1.12 Public Right-of-Way and Easements**

Contractor shall confine his/her operations within the limits of existing street right-of-way or easements as much as practicable.

### **1.13 Existing Facilities**

Protection and maintenance of existing utilities shall meet the applicable requirements of Sections 13 of the Standard Specifications and these Special Provisions.

Contractor will insure that utility services to customers in the project are maintained.

### **1.14 Maintaining Sewer Flows**

Contractor shall be responsible for maintaining sewer flows in accordance with Section 13-2 of the Standard Specifications. Contractor shall properly document and note sewers with high flows on the Application Log. As the term is used in the Application Log, "high flow" is defined as a sewer main with a flow depth greater than half of the pipe diameter.

No additional compensation will be paid to the Contractor for maintenance of existing facilities; the cost of this work shall be included in the various contract items of work.

### **1.15 Work Performed by City Crews**

Contractor is advised that where permitted, the City retains the option of performing with City crews all or any portion of the work identified in this Contract. Any such work performed by City staff/field crews will be at the discretion and convenience of the Program Manager and Planner/Scheduler. All work performed and/or materials provided by the City will be paid for by the Contractor, or will be removed from this contract so as to avoid additional cost to the City.

### **1.16 Health and Safety**

Contractor is warned that existing sewers and appurtenances have been exposed to sewage and industrial wastes. These facilities shall therefore be considered contaminated with disease-causing organisms. Personnel in contact with contaminated facilities, debris, wastewater, or similar items shall be advised by the Contractor of the necessary precautions that must be taken to avoid becoming diseased. It is the Contractor's responsibility to urge his/her personnel to observe a strict regime of proper hygienic precautions, including any inoculations recommended by the local public health officer.

Because of the danger of solvents, gasoline, and other hazardous material in the existing sewers, these areas shall be considered hazardous to open flame, sparks, or unventilated occupancy. The Contractor shall be aware of these dangers and shall take the necessary measures to assure his/her personnel observe proper safety precautions when working in these areas.

Contractor shall not allow any wastewater to discharge from sewage collection systems onto adjacent lands or waters. In case of accidental discharge, the Contractor shall be responsible for containment, immediate cleanup and disposal at his/her own expense to the full satisfaction of the Program Manager subject to all regulatory requirements. Where containment is not possible, adequate disinfection shall be provided by the Contractor at his/her expense as directed by the Program Manager or agency with jurisdiction. If, in the opinion of the Program Manager, the Contractor fails to adequately follow the above guidelines, Program Manager will make arrangements to have the work completed by others, and have the cost charged to the Contractor, for which the Contractor will be responsible.

All Contractors are hereby made aware of the City's Standard Operating Procedure (SOP) for Sewer Overflow/Outflow Emergency Response protocol and are required to respond to any sanitary sewer overflow (SSO) caused by the Contractor's work in the manner identified in the SOP. In the event of an SSO, the Program Manager shall be immediately contacted.

### **1.17 Traffic Control**

Traffic control measures and scheduling shall be in accordance with Chapter 12.20 of the City Code, Sections 6, 7 and 16 of the Standard Specifications, and as specified in these Special Provisions. Prior to starting work, Contractor shall submit for approval a plan showing proposed traffic control measures and/or detours for vehicles and pedestrians affected by the work. The plan shall be submitted in advance of any work to be performed (a minimum of ten (10) working days prior to the commencement of any work) and as part of the weekly scheduling coordination process with the Planner/Scheduler.

Work will not be allowed to begin without an approved plan. In addition, the approved plan shall be kept on hand at the project site at all times while work is in progress.

The traffic control plan shall include location of proposed work area, locations of areas where the public right of way will be closed or obstructed, and any proposed phases of traffic control and time period of when traffic control will be in effect. The traffic control plan shall also include name and business address of Contractor and a statement that the Contractor will comply with City's noise ordinance.

Contractor shall be solely and completely responsible for furnishing, installing, and maintaining all warning signs and devices necessary to safeguard the general public and the work, and to provide for the safe and proper routing of all vehicular and pedestrian traffic during the performance of the work. The requirement shall apply continuously and shall not be limited to normal working hours.

Where applicable, the following requirements from Chapter 12.20 of the City Code shall be included and performed under this item of work:

1. Public right-of-way, public property or public easement shall not be covered with work related trash, debris, garbage, waste material or soil. Areas affected by the work must be cleaned to the satisfaction of the Field Coordinator prior to re-opening to the public.
2. Access shall be provided to all existing driveways and buildings at all times except when arrangements are made with the property owner and/or tenant. Contractor shall take precautions so as not to entrap vehicles on private property during the progress of the work. Driveways may be closed only during normal working hours and only after giving property owners a minimum of twenty-four (24) hour notice in advance of the closure. Commercial buildings shall be given a forty-eight (48) hour notice. Access for emergency vehicles shall be available on all streets at all times.
3. Provide for pedestrian traffic at all times except where closures are approved in advance by the Field Coordinator.
4. Maintain at least one (1) lane of traffic at all times in all streets, except as provided in Section 6-10 of the Standard Specifications. All work within public streets and/or roadway right-of-way shall be done in an expeditious manner so as to cause as little inconvenience to the traveling public as possible. Including, but not limited to, primary streets and moratorium streets to which the requirements and administrative penalties of Chapter 12.20 of the City ordinance apply.
5. Working hours are defined as 7:00 am to 6:00 pm, Monday through Friday, excluding legal holidays, or unless otherwise specified in this Contract.
6. At night and at other times when work is not in progress, the entire roadway and alley shall be open to the public for pedestrian and vehicular traffic.

Contractor shall coordinate work such that work areas located within streets with the lowest speed limit are utilized first. Work area set up in higher speed limit streets shall be used only when necessary.

All signs and street marking damage caused by or related to the work of this project shall be replaced in kind by the Contractor. In the case of partial damage to lane stripes and traffic lettering the whole stripe or marking in its entirety shall be replaced. Temporary markings and striping shall be installed within three (3) working days of damage.

### **1.18 Removal of On Street Parking**

In locations where the Contractor's operations require removal of on-street parking, such removal shall be in accordance with Section 6-18 of the Standard Specifications.

Failure to comply with this section will prevent the City from towing vehicles parked in the proposed work area.

## **1.19 Payment**

Full compensation for furnishing all labor, materials, tools, equipment and incidentals and for doing all work involved in performing and complying with these items shall be considered as included in the prices paid for in the various contract bid items the Contractor deems appropriate and no additional compensation will be allowed.

## **ITEMS OF THE PROPOSAL**

### **Item No. 1      Mobilization**

Mobilization shall consist of preparatory work and operations including those necessary for the movement of personnel, equipment, supplies, and incidentals to the project site; and for other work and operations which must be performed or costs incurred prior to beginning work on the various contract items. Compensation for Mobilization shall not exceed five (5) percent of the total bid amount.

Payment shall be on a lump sum basis and shall include full compensation for furnishing all labor, materials, tools, equipment and incidentals necessary for performing work to completion.

### **Item Nos. 2 through 9: Citywide Application (All Geographic Areas [breakdown for individual areas are below])**

- Item No. 2      4 inch Pipe to Apply Root Control (approximately 443.14 linear feet)
- Item No. 3      6 inch Pipe to Apply Root Control (approximately 375,095.65 linear feet)
- Item No. 4      8 Inch Pipe to Apply Root Control (approximately 120,676.99 linear feet)
- Item No. 5      9 Inch Pipe to Apply Root Control (approximately 424.74 linear feet)
- Item No. 6      10 Inch Pipe to Apply Root Control (approximately 21,586.61 linear feet)
- Item No. 7      12 Inch Pipe to Apply Root Control (approximately 6,752.62 linear feet)
- Item No. 8      14 Inch Pipe to Apply Root Control (approximately 82.00 linear feet)
- Item No. 9      15 Inch Pipe to Apply Root Control (approximately 932.46 linear feet)

### **Item Nos. 10 through 16: River Park – North Area**

- Item No. 10     6 inch Pipe to Apply Root Control (approximately 81,035.05 linear feet)
- Item No. 11     8 inch Pipe to Apply Root Control (approximately 58,792.79 linear feet)
- Item No. 12     9 Inch Pipe to Apply Root Control (approximately 424.74 linear feet)
- Item No. 13     10 Inch Pipe to Apply Root Control (approximately 14,815.56 linear feet)
- Item No. 14     12 Inch Pipe to Apply Root Control (approximately 1,773.02 linear feet)
- Item No. 15     14 Inch Pipe to Apply Root Control (approximately 82.00 linear feet)
- Item No. 16     15 Inch Pipe to Apply Root Control (approximately 635.44 linear feet)

### **Item Nos. 17 through 21: Meadowview – Pocket Area**

- Item No. 17     6 inch Pipe to Apply Root Control (approximately 171,059.05 linear feet)
- Item No. 18     8 inch Pipe to Apply Root Control (approximately 39,640.96 linear feet)
- Item No. 19     10 Inch Pipe to Apply Root Control (approximately 2,900.90 linear feet)
- Item No. 20     12 Inch Pipe to Apply Root Control (approximately 269.55 linear feet)
- Item No. 21     15 Inch Pipe to Apply Root Control (approximately 240.13 linear feet)

### **Item Nos. 22 through 27: Hollywood Park – South Land Park Area**

- Item No. 22     4 inch Pipe to Apply Root Control (approximately 443.14 linear feet)
- Item No. 23     6 inch Pipe to Apply Root Control (approximately 123,001.55 linear feet)
- Item No. 24     8 Inch Pipe to Apply Root Control (approximately 22,243.24 linear feet)
- Item No. 25     10 Inch Pipe to Apply Root Control (approximately 3,870.15 linear feet)
- Item No. 26     12 Inch Pipe to Apply Root Control (approximately 4,710.05 linear feet)
- Item No. 27     15 Inch Pipe to Apply Root Control (approximately 56.89 linear feet)

The above-identified Items (pipes), as set forth above and as identified in the Maps located in the Appendix of these Special Provisions, shall be treated with application of an herbicide root control product. Only one root control product and method of application may be used throughout the project.

Pipes identified for treatment may be located in back yard easements and may have restricted access. Manholes in backyards are/may be enclosed by fencing. In addition, homeowners may also have placed obstacles (*i.e.*, sheds) over or around manholes. It is the Contractor's responsibility to identify manholes within which he/she will apply the chemical root control product and to locate and open such manholes. If the Contractor is unable to locate a manhole, Contractor shall notify the Planner/Scheduler at least two (2) working days prior to the scheduled work. Following such notification, City crews will locate manhole for Contractor.

The following are acceptable root control products, and Contractor shall provide basis as to why chosen product is best suited for this contract:

Vaporooter II – as manufactured by Douglas Products

RazoRouter II– as manufactured by Sewer Services, Inc.

Root control product shall be registered with the Environmental Protection Agency and the California Department of Pesticide Regulation for the use in sanitary sewer pipes. Contractor shall be licensed as a pesticide application business with the California Department of Pesticide Regulation. All work shall be performed by Certified Pesticide Applicators licensed with the California Department of Pesticide Regulation, and experienced in the application of the root control products, as herein specified.

Application of the root control product shall be in accordance with the detailed installation procedures submitted with the product. Application of herbicide shall be only done by foaming; no pour down chemical application shall be accepted. Foaming shall be generated and pumped into the sewer line under pressure as foam.

Equipment used shall be capable of applying herbicide so as to deposit at least 800 feet of sewer pipe from a single entry point. Application of material shall be in such a way as to contact all roots within the sewer pipe being treated. Foaming shall be at sufficient pressure to treat the lateral pipe connections a minimum of five (5) feet and a maximum of ten (10) feet, beyond the main sewer line. Herbicide shall be capable of penetrating roots and causing these to die and decay.

Payment shall be at the unit price bid per lineal foot of herbicide applied and shall include full compensation for furnishing all labor, materials, tools, equipment and incidentals necessary for performing work to completion.

## EXHIBIT B

### NONPROFESSIONAL SERVICES AGREEMENT

#### FEE SCHEDULE/MANNER OF PAYMENT

1. **CONTRACTOR's Compensation.** The total of all fees paid to the CONTRACTOR for the performance of all services set forth in Exhibit A, including normal revisions (hereafter the "Services"), and for all authorized Reimbursable Expenses, shall not exceed the total sum of **\$1,049,753.01**.
2. **Billable Rates.** CONTRACTOR shall be paid for the performance of Services on an hourly rate, daily rate, flat fee, lump sum or other basis, as set forth in Attachment 1 to Exhibit B, attached hereto and incorporated herein.
3. **CONTRACTOR's Reimbursable Expenses.** Reimbursable Expenses shall be limited to actual expenditures of CONTRACTOR for expenses that are necessary for the proper completion of the Services and shall only be payable if specifically authorized in advance by CITY.
4. **Payments to CONTRACTOR.**
  - A. Payments to CONTRACTOR shall be made within a reasonable time after receipt of CONTRACTOR's invoice, in proportion to services performed or as otherwise specified in Attachment 1 to Exhibit B. CONTRACTOR may request payment on a monthly basis. CONTRACTOR shall be responsible for the cost of supplying all documentation necessary to verify the monthly billings to the satisfaction of CITY.
  - B. All invoices submitted by CONTRACTOR shall contain the following information:
    - (1) Job Name
    - (2) Description of services billed under this invoice, and overall status of project
    - (3) Date of Invoice Issuance
    - (4) Sequential Invoice Number
    - (5) CITY's Purchase Order Number
    - (6) Total Contract Amount
    - (7) Amount of this Invoice (Itemize all Reimbursable Expenses)
    - (8) Total Billed to Date
    - (9) Total Remaining on Contract
    - (10) Updated project schedule. This shall identify those steps that shall be taken to bring the project back on schedule if it is behind schedule.
  - C. Items shall be separated into Services and Reimbursable Expenses. Billings that do not conform to the format outlined above shall be returned to CONTRACTOR for correction. CITY shall not be responsible for delays in payment to CONTRACTOR resulting from CONTRACTOR's failure to comply with the invoice format described above.

D. Requests for payment shall be sent to:

**Department of Utilities**  
**1391 35<sup>th</sup> Avenue, Sacramento, CA 95822**  
**Phone: (916) 808-1343/Email: [rlane@cityofsacramento.org](mailto:rlane@cityofsacramento.org)**  
**Attn: Rebecca Lane**

5. **Additional Services.** Additional Services are those services related to the scope of services of CONTRACTOR set forth in Exhibit A but not anticipated at the time of execution of this Agreement. Additional Services shall be provided only when a Supplemental Agreement authorizing the Additional Services is approved by CITY in accordance with CITY's Supplemental Agreement procedures. CITY reserves the right to perform any Additional Services with its own staff or to retain other contractors to perform the Additional Services.
6. **Accounting Records of CONTRACTOR.** During performance of this Agreement and for a period of three (3) years after completing all Services and Additional Services hereunder, CONTRACTOR shall maintain all accounting and financial records related to this Agreement, including, but not limited to, records of CONTRACTOR's costs for all Services and Additional Services performed under this Agreement and records of CONTRACTOR's Reimbursable Expenses, in accordance with generally accepted accounting practices, and shall keep and make the records available for inspection and audit by representatives of the CITY upon reasonable written notice.
7. **Taxes.** CONTRACTOR shall pay, when and as due, any and all taxes incurred as a result of CONTRACTOR's compensation hereunder, including estimated taxes, and shall provide CITY with proof of the payment upon request. CONTRACTOR hereby agrees to indemnify CITY for any claims, losses, costs, fees, liabilities, damages or injuries suffered by CITY arising out of CONTRACTOR's breach of this Section 7.

**ATTACHMENT 1 TO EXHIBIT B**

**FEE SCHEDULE**

BID NO. B16141421044

**SECTION III – BIDDER RESPONSE DOCUMENTS**

**G. PRICING SCHEDULE**

The work herein described is to be performed in strict conformity with the Special Provisions and Scope of Services, at the unit prices listed below. Unit price shall include full compensation for furnishing all labor, materials, tools, equipment and incidentals and for doing all work involved in applying an herbicide to sewer pipes.

TOTAL BID AMOUNT: \$ 6,049,753.01				YEAR ONE		YEAR TWO		YEAR THREE		YEAR FOUR	
Item Nos.	Description	Estimated Quantity	UNIT	Unit Price	Total	Unit Price	Total	Unit Price	Total	Unit Price	Total
2	Mechanical	440.16	LF	\$		XX		XX		XX	
22	4-inch Pipe	343.14	LF	\$ 1.98	\$ 679.52	XX	XX	XX	XX	\$ 1.98	\$ 679.52
3		274026.05		\$		XX		XX		XX	
10	5-inch Pipe	410.8566	LF	XX	XX	\$ 1.98	\$ 813.49	XX	XX	XX	XX
17		171029.05		XX	XX	XX	XX	\$ 1.98	\$ 338.57	XX	XX
23		121071.25		XX	XX	XX	XX	XX	XX	\$ 1.98	\$ 239.72
4		120879.82		\$ 1.98	\$ 239.34	XX	XX	XX	XX	XX	XX
11	24-inch Pipe	46729.70	LF	XX	XX	\$ 1.98	\$ 92.57	XX	XX	XX	XX
10		32640.85		XX	XX	XX	XX	\$ 1.98	\$ 64.68	XX	XX
14		27245.24		XX	XX	XX	XX	XX	XX	\$ 1.98	\$ 53.94
5	8-inch Pipe	424.74	LF	\$ 1.98	\$ 841.10	XX	XX	XX	XX	XX	XX
12		424.74		XX	XX	\$ 1.98	\$ 841.10	XX	XX	XX	XX
6		21525.81		\$ 1.30	\$ 2798.36	XX	XX	XX	XX	XX	XX
13	12-inch Pipe	14815.62	LF	XX	XX	\$ 1.30	\$ 1926.03	XX	XX	XX	XX
9		2800.89		XX	XX	XX	XX	\$ 1.30	\$ 364.12	XX	XX
25		3870.75		XX	XX	XX	XX	XX	XX	\$ 1.30	\$ 5032.20
7		6132.87		\$ 1.30	\$ 7972.83	XX	XX	XX	XX	XX	XX
4	12-inch Pipe	17510.7	LF	XX	XX	\$ 1.30	\$ 22764.91	XX	XX	XX	XX
20		239.35		XX	XX	XX	XX	\$ 1.30	\$ 311.16	XX	XX
26		4710.05		XX	XX	XX	XX	XX	XX	\$ 1.30	\$ 6123.87
5	14-inch Pipe	5700	LF	\$ 1.30	\$ 7410.00	XX	XX	XX	XX	XX	XX
15		5700		XX	XX	\$ 1.30	\$ 7410.00	XX	XX	XX	XX
8		322.45		\$ 1.30	\$ 419.19	XX	XX	XX	XX	XX	XX
16	18-inch Pipe	635.44	LF	XX	XX	\$ 1.30	\$ 826.07	XX	XX	XX	XX
17		240.13		XX	XX	XX	XX	\$ 1.30	\$ 312.17	XX	XX
27		50.28		XX	XX	XX	XX	XX	XX	\$ 1.30	\$ 65.36
<b>TOTAL BY YEAR</b>				\$	<b>3824,047.01</b>	\$	<b>6,591,952.55</b>	\$	<b>3,200,819.76</b>	\$	<b>6,158,042.30</b>

EXHIBIT C

NONPROFESSIONAL SERVICES AGREEMENT

FACILITIES AND EQUIPMENT TO BE PROVIDED BY CITY

CITY shall *[check one]*

\_\_\_\_\_ Not furnish any facilities or equipment for this Agreement;

or

XXXXX Furnish the following facilities or equipment for the Agreement *[list, if applicable]*:

To facilitate the provision of services by CONTRACTOR's security specialist, the CITY will furnish a temporary work station with a computer and internet access, as well as access to City systems as needed to perform the services described in Exhibit A of this Agreement.

## EXHIBIT D

### NONPROFESSIONAL SERVICES AGREEMENT

#### GENERAL PROVISIONS

#### 1. Independent Contractor.

- A. It is understood and agreed that CONTRACTOR (including CONTRACTOR's employees) is an independent contractor and that no relationship of employer-employee exists between the parties hereto for any purpose whatsoever. Neither CONTRACTOR nor CONTRACTOR's assigned personnel shall be entitled to any benefits payable to employees of CITY. CITY is not required to make any deductions or withholdings from the compensation payable to CONTRACTOR under the provisions of this Agreement, and CONTRACTOR shall be issued a Form 1099 for its services hereunder. As an independent contractor, CONTRACTOR hereby agrees to indemnify and hold CITY harmless from any and all claims that may be made against CITY based upon any contention by any of CONTRACTOR's employees or by any third party, including but not limited to any state or federal agency, that an employer-employee relationship or a substitute therefor exists for any purpose whatsoever by reason of this Agreement or by reason of the nature and/or performance of any Services under this Agreement. (As used in this Exhibit D, the term "Services" shall include both Services and Additional Services as such terms are defined elsewhere in this Agreement.)
- B. It is further understood and agreed by the parties hereto that CONTRACTOR, in the performance of its obligations hereunder, is subject to the control and direction of CITY as to the designation of tasks to be performed and the results to be accomplished under this Agreement, but not as to the means, methods, or sequence used by CONTRACTOR for accomplishing such results. To the extent that CONTRACTOR obtains permission to, and does, use CITY facilities, space, equipment or support services in the performance of this Agreement, this use shall be at the CONTRACTOR's sole discretion based on the CONTRACTOR's determination that such use will promote CONTRACTOR's efficiency and effectiveness. Except as may be specifically provided elsewhere in this Agreement, the CITY does not require that CONTRACTOR use CITY facilities, equipment or support services or work in CITY locations in the performance of this Agreement.
- C. If, in the performance of this Agreement, any third persons are employed by CONTRACTOR, such persons shall be entirely and exclusively under the direction, supervision, and control of CONTRACTOR. Except as may be specifically provided elsewhere in this Agreement, all terms of employment, including hours, wages, working conditions, discipline, hiring, and discharging, or any other terms of employment or requirements of law, shall be determined by CONTRACTOR. It is further understood and agreed that CONTRACTOR shall issue W-2 or 1099 Forms for income and employment tax purposes, for all of CONTRACTOR's assigned personnel and subcontractors.
- D. The provisions of this Section 1 shall survive any expiration or termination of this Agreement. Nothing in this Agreement shall be construed to create an exclusive relationship between CITY and CONTRACTOR. CONTRACTOR may represent, perform

services for, or be employed by such additional persons or companies as CONTRACTOR sees fit provided that CONTRACTOR does not violate the provisions of Section 5, below.

2. **Licenses; Permits, Etc.** CONTRACTOR represents and warrants that CONTRACTOR has all licenses, permits, City Business Operations Tax Certificate, qualifications, and approvals of whatsoever nature that are legally required for CONTRACTOR to practice its profession or provide any services under the Agreement. CONTRACTOR represents and warrants that CONTRACTOR shall, at its sole cost and expense, keep in effect or obtain at all times during the term of this Agreement any licenses, permits, and approvals that are legally required for CONTRACTOR to practice its profession or provide such Services. Without limiting the generality of the foregoing, if CONTRACTOR is an out-of-state corporation, CONTRACTOR warrants and represents that it possesses a valid certificate of qualification to transact business in the State of California issued by the California Secretary of State pursuant to Section 2105 of the California Corporations Code.
3. **Time.** CONTRACTOR shall devote such time and effort to the performance of Services pursuant to this Agreement as is necessary for the satisfactory and timely performance of CONTRACTOR's obligations under this Agreement. Neither party shall be considered in default of this Agreement, to the extent that party's performance is prevented or delayed by any cause, present or future, that is beyond the reasonable control of that party.
4. **CONTRACTOR Not Agent.** Except as CITY may specify in writing, CONTRACTOR and CONTRACTOR's personnel shall have no authority, express or implied, to act on behalf of CITY in any capacity whatsoever as an agent. CONTRACTOR and CONTRACTOR's personnel shall have no authority, express or implied, to bind CITY to any obligations whatsoever.
5. **Conflicts of Interest.** CONTRACTOR covenants that neither it, nor any officer or principal of its firm, has or shall acquire any interest, directly or indirectly, that would conflict in any manner with the interests of CITY or that would in any way hinder CONTRACTOR's performance of Services under this Agreement. CONTRACTOR further covenants that in the performance of this Agreement, no person having any such interest shall be employed by it as an officer, employee, agent or subcontractor, without the written consent of CITY. CONTRACTOR agrees to avoid conflicts of interest or the appearance of any conflicts of interest with the interests of CITY at all times during the performance of this Agreement. If CONTRACTOR is or employs a former officer or employee of the CITY, CONTRACTOR and any such employee(s) shall comply with the provisions of Sacramento City Code Section 2.16.090 pertaining to appearances before the City Council or any CITY department, board, commission or committee.
6. **Confidentiality of CITY Information.** During performance of this Agreement, CONTRACTOR may gain access to and use CITY information regarding inventions, machinery, products, prices, apparatus, costs, discounts, future plans, business affairs, governmental affairs, processes, trade secrets, technical matters, systems, facilities, customer lists, product design, copyright, data, and other vital information (hereafter collectively referred to as "City Information") that are valuable, special and unique assets of the CITY. CONTRACTOR agrees to protect all City Information and treat it as strictly confidential, and further agrees that CONTRACTOR shall not at any time, either directly or indirectly, divulge, disclose or communicate in any manner any City Information to any third party without the prior written consent of CITY. In addition, CONTRACTOR shall comply with all CITY policies governing the use of the CITY network and technology systems, as set forth in applicable provisions of the City of Sacramento Administrative Policy Instructions # 30. A

violation by CONTRACTOR of this Section 6 shall be a material violation of this Agreement and shall justify legal and/or equitable relief.

**7. CONTRACTOR Information.**

- A. CITY shall have full ownership and control, including ownership of any copyrights, of all information prepared, produced, or provided by CONTRACTOR pursuant to this Agreement. In this Agreement, the term "information" shall be construed to mean and include: any and all work product, submittals, reports, plans, specifications, and other deliverables consisting of documents, writings, handwritings, typewriting, printing, photostating, photographing, computer models, and any other computerized data and every other means of recording any form of information, communications, or representation, including letters, works, pictures, drawings, sounds, or symbols, or any combination thereof. CONTRACTOR shall not be responsible for any unauthorized modification or use of such information for other than its intended purpose by CITY.
- B. CONTRACTOR shall fully defend, indemnify and hold harmless CITY, its officers and employees, and each and every one of them, from and against any and all claims, actions, lawsuits or other proceedings alleging that all or any part of the information prepared, produced, or provided by CONTRACTOR pursuant to this Agreement infringes upon any third party's trademark, trade name, copyright, patent or other intellectual property rights. CITY shall make reasonable efforts to notify CONTRACTOR not later than ten (10) days after CITY is served with any such claim, action, lawsuit or other proceeding, provided that CITY's failure to provide such notice within such time period shall not relieve CONTRACTOR of its obligations hereunder, which shall survive any termination or expiration of this Agreement.
- C. All proprietary and other information received from CONTRACTOR by CITY, whether received in connection with CONTRACTOR's proposal to CITY or in connection with any Services performed by CONTRACTOR, will be disclosed upon receipt of a request for disclosure, pursuant to the California Public Records Act; provided, however, that, if any information is set apart and clearly marked "trade secret" when it is provided to CITY, CITY shall give notice to CONTRACTOR of any request for the disclosure of such information. The CONTRACTOR shall then have five (5) days from the date it receives such notice to enter into an agreement with the CITY, satisfactory to the City Attorney, providing for the defense of, and complete indemnification and reimbursement for all costs (including plaintiff's attorney fees) incurred by CITY in any legal action to compel the disclosure of such information under the California Public Records Act. The CONTRACTOR shall have sole responsibility for defense of the actual "trade secret" designation of such information.
- D. The parties understand and agree that any failure by CONTRACTOR to respond to the notice provided by CITY and/or to enter into an agreement with CITY, in accordance with the provisions of subsection C, above, shall constitute a complete waiver by CONTRACTOR of any rights regarding the information designated "trade secret" by CONTRACTOR, and such information shall be disclosed by CITY pursuant to applicable procedures required by the Public Records Act.

8. **Standard of Performance.** CONTRACTOR shall perform all Services required pursuant to this Agreement in the manner and according to the standards currently observed by a competent practitioner of CONTRACTOR's profession in California. All products of whatsoever nature that CONTRACTOR delivers to CITY pursuant to this Agreement shall be prepared in a professional manner and conform to the standards of quality normally observed by a person currently practicing in CONTRACTOR's profession, and shall be provided in accordance with any schedule of performance specified in Exhibit A. CONTRACTOR shall assign only competent personnel to perform Services pursuant to this Agreement. CONTRACTOR shall notify CITY in writing of any changes in CONTRACTOR's staff assigned to perform the Services required under this Agreement, prior to any such performance. In the event that CITY, at any time during the term of this Agreement, desires the removal of any person assigned by CONTRACTOR to perform Services pursuant to this Agreement, because CITY, in its sole discretion, determines that such person is not performing in accordance with the standards required herein, CONTRACTOR shall remove such person immediately upon receiving notice from CITY of the desire of CITY for the removal of such person.

9. **Term; Suspension; Termination.**

- A. This Agreement shall become effective on the date that it is approved by both parties, set forth on the first page of the Agreement, and shall continue in effect until both parties have fully performed their respective obligations under this Agreement, unless sooner terminated as provided herein.
- B. CITY shall have the right at any time to temporarily suspend CONTRACTOR's performance hereunder, in whole or in part, by giving a written notice of suspension to CONTRACTOR. If CITY gives such notice of suspension, CONTRACTOR shall immediately suspend its activities under this Agreement, as specified in such notice.
- C. CITY shall have the right to terminate this Agreement at any time by giving a written notice of termination to CONTRACTOR. If CITY gives such notice of termination, CONTRACTOR shall immediately cease rendering Services pursuant to this Agreement. If CITY terminates this Agreement:
  - (1) CONTRACTOR shall, not later than five days after such notice of termination, deliver to CITY copies of all information prepared pursuant to this Agreement.
  - (2) CITY shall pay CONTRACTOR the reasonable value of Services rendered by CONTRACTOR prior to termination; provided, however, CITY shall not in any manner be liable for lost profits that might have been made by CONTRACTOR had the Agreement not been terminated or had CONTRACTOR completed the Services required by this Agreement. In this regard, CONTRACTOR shall furnish to CITY such financial information as in the judgment of the CITY is necessary for CITY to determine the reasonable value of the Services rendered by CONTRACTOR. The foregoing is cumulative and does not affect any right or remedy that CITY may have in law or equity.

**10. Indemnity.**

- A. Indemnity: CONTRACTOR shall defend, hold harmless and indemnify CITY, its officers and employees, and each and every one of them, from and against any and all actions, damages, costs, liabilities, claims, demands, losses, judgments, penalties, costs and expenses of every type and description, including, but not limited to, any fees and/or costs reasonably incurred by CITY's staff attorneys or outside attorneys and any fees and expenses incurred in enforcing this provision (hereafter collectively referred to as "Liabilities"), including but not limited to Liabilities arising from personal injury or death, damage to personal, real or intellectual property or the environment, contractual or other economic damages, or regulatory penalties, arising out of or in any way connected with performance of or failure to perform this Agreement by CONTRACTOR, any subcontractor or agent, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, whether or not (i) such Liabilities are caused in part by a party indemnified hereunder or (ii) such Liabilities are litigated, settled or reduced to judgment; provided that the foregoing indemnity does not apply to liability for any damage or expense for death or bodily injury to persons or damage to property to the extent arising from the sole negligence or willful misconduct of CITY, its agents, servants, or independent contractors who are directly responsible to CITY, except when such agents, servants, or independent contractors are under the direct supervision and control of CONTRACTOR.
  
- B. Insurance Policies; Intellectual Property Claims: The existence or acceptance by CITY of any of the insurance policies or coverages described in this Agreement shall not affect or limit any of CITY's rights under this Section 10, nor shall the limits of such insurance limit the liability of CONTRACTOR hereunder. This Section 10 shall not apply to any intellectual property claims, actions, lawsuits or other proceedings subject to the provisions of Section 7.B., above. The provisions of this Section 10 shall survive any expiration or termination of this Agreement.

**11. Insurance Requirements.** During the entire term of this Agreement, CONTRACTOR shall maintain the insurance coverage described in this Section 11.

Full compensation for all premiums that CONTRACTOR is required to pay for the insurance coverage described herein shall be included in the compensation specified for the Services provided by CONTRACTOR under this Agreement. No additional compensation will be provided for CONTRACTOR's insurance premiums. Any available insurance proceeds in excess of the specified minimum limits and coverages shall be available to the CITY.

It is understood and agreed by the CONTRACTOR that its liability to the CITY shall not in any way be limited to or affected by the amount of insurance coverage required or carried by the CONTRACTOR in connection with this Agreement.

A. Minimum Scope & Limits of Insurance Coverage

- (1) Commercial General Liability Insurance providing coverage at least as broad as ISO CGL Form 00 01 on an occurrence basis for bodily injury, including death, of one or more persons, property damage, and personal injury, arising out of activities

performed by or on behalf of CONTRACTOR, its sub-consultants, and subcontractors, products and completed operations of CONTRACTOR, its sub-consultants, and subcontractors, and premises owned, leased, or used by CONTRACTOR, its sub-consultants, and subcontractors, with limits of not less than one million dollars (\$1,000,000) per occurrence. The policy shall provide contractual liability and products and completed operations coverage for the term of the policy.

- (2) Automobile Liability Insurance providing coverage at least as broad as ISO Form CA 00 01 for bodily injury, including death, of one or more persons, property damage, and personal injury, with limits of not less than one million dollars (\$1,000,000) per accident. The policy shall provide coverage for owned, non-owned, and/or hired autos as appropriate to the operations of the CONTRACTOR.

No automobile liability insurance shall be required if CONTRACTOR completes the following certification:

“I certify that a motor vehicle will not be used in the performance of any work or services under this agreement.” \_\_\_\_\_ (CONTRACTOR initials)

- (3) Excess Insurance: The minimum limits of insurance required above may be satisfied by a combination of primary and umbrella or excess insurance coverage; provided that any umbrella or excess insurance shall contain, or be endorsed to contain, a provision that it shall apply on a primary basis for the benefit of the CITY, and any insurance or self-insurance maintained by CITY, its officials, employees, or volunteers shall be in excess of such umbrella or excess coverage and shall not contribute with it.

- (4) Workers’ Compensation Insurance with statutory limits, and Employers’ Liability Insurance with limits of not less than one million dollars (\$1,000,000). The Workers’ Compensation policy shall include a waiver of subrogation in favor of the CITY. If no work or services will be performed on or at CITY facilities or CITY Property, the CITY Representative may waive this requirement by selecting the option below:

Workers’ Compensation waiver of subrogation in favor of the CITY is not required. \_\_\_\_\_ (CITY Representative initials)

No Workers’ Compensation insurance shall be required if CONTRACTOR completes the following certification:

“I certify that my business has no employees, and that I do not employ anyone. I am exempt from the legal requirements to provide Workers’ Compensation insurance.” \_\_\_\_\_ (CONTRACTOR initials)

B. Additional Insured Coverage

- (1) Commercial General Liability Insurance: The CITY, its officials, employees, and volunteers shall be covered by policy terms or endorsement as additional insureds as respects general liability arising out of: activities performed by or on behalf of CONTRACTOR, its sub-consultants, and subcontractors; products and completed operations of CONTRACTOR, its sub-consultants, and subcontractors; and premises owned, leased, or used by CONTRACTOR, its sub-consultants, and subcontractors.
- (2) Automobile Liability Insurance: The CITY, its officials, employees, and volunteers shall be covered by policy terms or endorsement as additional insureds as respects auto liability.

C. Other Insurance Provisions

The policies are to contain, or be endorsed to contain, the following provisions:

- (1) CONTRACTOR's insurance coverage, including excess insurance, shall be primary insurance as respects CITY, its officials, employees, and volunteers. Any insurance or self-insurance maintained by CITY, its officials, employees, or volunteers shall be in excess of CONTRACTOR's insurance and shall not contribute with it.
- (2) Any failure to comply with reporting provisions of the policies shall not affect coverage provided to CITY, its officials, employees, or volunteers.
- (3) Coverage shall state that CONTRACTOR's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.
- (4) CITY will be provided with thirty (30) days written notice of cancellation or material change in the policy language or terms.

D. Acceptability of Insurance

Insurance shall be placed with insurers with a Bests' rating of not less than A:VI. Self-insured retentions, policy terms or other variations that do not comply with the requirements of this Section 11 must be declared to and approved by the CITY in writing prior to execution of this Agreement.

E. Verification of Coverage

- (1) CONTRACTOR shall furnish CITY with certificates and required endorsements evidencing the insurance required. The certificates and endorsements shall be forwarded to the CITY representative named in Exhibit A. Copies of policies shall be delivered to the CITY on demand. Certificates of insurance shall be signed by an authorized representative of the insurance carrier.

- (2) For all insurance policy renewals during the term of this Agreement, CONTRACTOR shall send insurance certificates reflecting the policy renewals directly to:

City of Sacramento  
c/o EXIGIS LLC  
P.O. Box 4668 ECM- #35050  
New York, NY 10168-4668

Insurance certificates also may be faxed to (888) 355-3599, or e-mailed to: certificates-sacramento@riskworks.com

- (3) The CITY may withdraw its offer of contract or cancel this Agreement if the certificates of insurance and endorsements required have not been provided prior to execution of this Agreement. The CITY may withhold payments to CONTRACTOR or cancel the Agreement if the insurance is canceled or CONTRACTOR otherwise ceases to be insured as required herein.

F. Subcontractors

CONTRACTOR shall require and verify that all sub-consultants and subcontractors maintain insurance coverage that meets the minimum scope and limits of insurance coverage specified in subsection A, above.

**12. Equal Employment Opportunity.** During the performance of this Agreement, CONTRACTOR, for itself, its assignees and successors in interest, agrees as follows:

- A. Compliance With Regulations: CONTRACTOR shall comply with the Executive Order 11246 entitled "Equal Opportunity in Federal Employment", as amended by Executive Order 11375 and 12086, and as supplemented in Department of Labor regulations (41 CFR Chapter 60), hereinafter collectively referred to as the "Regulations".
- B. Nondiscrimination: CONTRACTOR, with regards to the work performed by it after award and prior to completion of the work pursuant to this Agreement, shall not discriminate on the ground of race, color, religion, sex, national origin, age, marital status, physical handicap or sexual orientation in selection and retention of subcontractors, including procurement of materials and leases of equipment. CONTRACTOR shall not participate either directly or indirectly in discrimination prohibited by the Regulations.
- C. Solicitations for Subcontractors, Including Procurement of Materials and Equipment: In all solicitations either by competitive bidding or negotiations made by CONTRACTOR for work to be performed under any subcontract, including all procurement of materials or equipment, each potential subcontractor or supplier shall be notified by CONTRACTOR of CONTRACTOR's obligation under this Agreement and the Regulations relative to nondiscrimination on the ground of race, color, religion, sex, national origin, age, marital status, physical handicap or sexual orientation.
- D. Information and Reports: CONTRACTOR shall provide all information and reports required by the Regulations, or by any orders or instructions issued pursuant thereto, and shall

permit access to its books, records, accounts, other sources of information and its facilities as may be determined by the CITY to be pertinent to ascertain compliance with such Regulations, orders and instructions. Where any information required of CONTRACTOR is in the exclusive possession of another who fails or refuses to furnish this information, CONTRACTOR shall so certify to the CITY, and shall set forth what efforts it has made to obtain the information.

E. Sanctions for Noncompliance: In the event of noncompliance by CONTRACTOR with the nondiscrimination provisions of this Agreement, the CITY shall impose such sanctions as it may determine to be appropriate including, but not limited to:

- (1) Withholding of payments to CONTRACTOR under this Agreement until CONTRACTOR complies;
- (2) Cancellation, termination, or suspension of the Agreement, in whole or in part.

F. Incorporation of Provisions: CONTRACTOR shall include the provisions of subsections A through E, above, in every subcontract, including procurement of materials and leases of equipment, unless exempted by the Regulations, or by any order or instructions issued pursuant thereto. CONTRACTOR shall take such action with respect to any subcontract or procurement as the CITY may direct as a means of enforcing such provisions including sanctions for noncompliance; provided, however, that in the event CONTRACTOR becomes involved in, or is threatened with, litigation with a subcontractor or supplier as a result of such direction, CONTRACTOR may request CITY to enter such litigation to protect the interests of CITY.

13. **Entire Agreement.** This document, including all Exhibits, contains the entire agreement between the parties and supersedes whatever oral or written understanding they may have had prior to the execution of this Agreement. No alteration to the terms of this Agreement shall be valid unless approved in writing by CONTRACTOR, and by CITY, in accordance with applicable provisions of the Sacramento City Code.
14. **Severability.** If any portion of this Agreement or the application thereof to any person or circumstance shall be held invalid or unenforceable, the remainder of this Agreement shall not be affected thereby and shall be enforced to the greatest extent permitted by law.
15. **Waiver.** Neither CITY acceptance of, or payment for, any Service or Additional Service performed by CONTRACTOR, nor any waiver by either party of any default, breach or condition precedent, shall be construed as a waiver of any provision of this Agreement, nor as a waiver of any other default, breach or condition precedent or any other right hereunder.
16. **Enforcement of Agreement.** This Agreement shall be governed, construed and enforced in accordance with the laws of the State of California. Venue of any litigation arising out of or connected with this Agreement shall lie exclusively in the state trial court or Federal District Court located in Sacramento County in the State of California, and the parties consent to jurisdiction over their persons and over the subject matter of any such litigation in such courts, and consent to service of process issued by such courts.

17. **Assignment Prohibited.** The expertise and experience of CONTRACTOR are material considerations for this Agreement. CITY has a strong interest in the qualifications and capability of the persons and entities that will fulfill the obligations imposed on CONTRACTOR under this Agreement. In recognition of this interest, CONTRACTOR shall not assign any right or obligation pursuant to this Agreement without the written consent of the CITY. Any attempted or purported assignment without CITY's written consent shall be void and of no effect.
18. **Binding Effect.** This Agreement shall be binding on the heirs, executors, administrators, successors and assigns of the parties, subject to the provisions of Section 17, above.
19. **Use Tax Requirements.** During the performance of this Agreement, CONTRACTOR, for itself, its assignees and successors in interest, agrees as follows:
  - A. Use Tax Direct Payment Permit: For all leases and purchases of materials, equipment, supplies, or other tangible personal property used to perform the Contract or Agreement and shipped from outside California, the Contractor and any subcontractors leasing or purchasing such materials, equipment, supplies or other tangible personal property shall obtain a Use Tax Direct Payment Permit from the California State Board of Equalization ("SBE") in accordance with the applicable SBE criteria and requirements.
  - B. Sellers Permit: For any construction contract and any construction subcontract in the amount of \$5,000,000 or more, Contractor and the subcontractor(s) shall obtain sellers permits from the SBE and shall register the jobsite as the place of business for the purpose of allocating local sales and use tax to the City. Contractor and its subcontractors shall remit the self-accrued use tax to the SBE, and shall provide a copy of each remittance to the City.
  - C. The above provisions shall apply in all instances unless prohibited by the funding source for the Contract or Agreement.

**EXHIBIT E**  
**LIVING WAGE REQUIREMENTS**  
(Nonprofessional Service Agreement)

**The Living Wage Ordinance**

The City of Sacramento's Living Wage Ordinance (the "LWO") is codified as Chapter 3.58 of the Sacramento City Code. The LWO requires certain firms that enter into agreements or contracts (all subsequent references to a "contract" or "contracts" will refer to both contracts and agreements) to provide certain services to or for the CITY, to pay a specified minimum level of compensation to their employees for time spent performing any work on the CITY contract. The LWO also applies to certain subcontractors.

The LWO applies to contracts entered into, amended, or renewed or extended at the CITY's discretion, on or after March 1, 2004 (the "LWO Effective Date").

**Contracts and Contractors Covered by the LWO**

Determining whether the LWO applies to a specific CITY contract, contractor or subcontractor, depends on whether the contract, contractor and/or subcontractor meet the criteria specified in the LWO for contract type, contract amount, contractor size (# of employees), subcontract amount and subcontractor size (# of employees). These criteria are summarized below.

Contract Type

The LWO applies only to contracts for Nonprofessional Services. Under the LWO, this includes contracts for any services of a nonprofessional character, including but not limited to tree trimming services, repair services for motor vehicles and office equipment, vehicle towing, and security services.

The LWO does not apply to: (1) Incidental services, such as delivery, installation or maintenance, that are provided under contracts for the purchase or lease of equipment, supplies, or other personal property; (2) contracts that are subject to CITY, state, or federal prevailing-wage requirements; (3) contracts for professional services (including but not limited to services rendered by engineers, architects, auditors, banks, consultants, actuaries and attorneys); and (4) contracts with nonprofit corporations that are organized under section 501 of the Internal Revenue Code and have fewer than 100 employees, whether full or part time.

Contract Amount

The LWO applies to contracts entered into or amended after the LWO Effective Date that provide compensation from the CITY of \$100,000 or more. In addition, the LWO applies to a contract entered into or amended after the LWO Effective Date that, by itself, does not reach this amount, if the aggregate value of that contract and of any other Nonprofessional Services contracts covered by the LWO that the CITY has awarded to the same person or firm within the previous 12 months, is \$100,000 or more. IT IS THE CONTRACTOR'S RESPONSIBILITY TO DETERMINE WHETHER THIS AGGREGATE VALUE IS \$100,000 OR MORE, AND TO NOTIFY THE CITY IN WRITING WHENEVER THIS IS THE CASE.

### Contractor Size

The LWO only applies to a contractor that has at least 25 employees, working either full or part time. The number of employees that a contractor has is determined by adding the contractor's employees and the employees of any other person or entity deemed to be a "Related Person" under the LWO.<sup>1</sup>

### Subcontract Amount

The LWO applies to a subcontractor providing services under a covered contract if the amount of the subcontract is at least 25 % of the contract amount, without regard to the number of employees the subcontractor has.

### Subcontractor Size

The LWO also applies to a subcontractor providing services under a covered contract if the subcontractor has at least 25 employees, working either full or part time, whether or not the amount of the subcontract is at least 25 % of the contract amount.

## **Payment of Living Wage to Covered Employees**

If a contractor or subcontractor meets the criteria specified in the LWO for contract type, contract amount, contractor size, subcontract amount and/or subcontractor size, the contractor or subcontractor is deemed to be a "Covered Employer" under the LWO. The LWO requires a Covered Employer to provide specified minimum compensation to its employees who perform work directly related to the CITY contract (these employees are called "Covered Employees" under the LWO), for all hours the Covered Employees perform under the CITY contract.<sup>2</sup>

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<sup>1</sup> The LWO provides that a person or entity is a Related Person when any of the following circumstances exists:

- (1) The person or entity and the contractor are both corporations, and (i) share a majority of members of their governing boards, or (ii) have two or more officers in common, or (iii) are controlled by the same majority shareholder or shareholders (control means more than 50% of the corporation's voting power), or (iv) are in a parent-subsidiary relationship (such a relationship exists when one corporation directly or indirectly owns shares possessing more than 50% of another corporation's voting power); or
- (2) The person or entity otherwise controls and directs, or is controlled and directed by, the contractor, as determined by the City Manager.

<sup>2</sup> A Covered Employee includes full-time, part-time, contingent, contract and temporary employees, but does not include: (1) individuals who participate in job-training-and-education programs that have, as their express purpose, the provision of basic job skills and education to participants, with the goal of earning a high-school-equivalency diploma and permanent employment; (2) student interns; (3) individuals participating in specialized-training programs; and (4) an employee whose term and conditions of employment are governed by a bona fide collective-bargaining agreement containing an express waiver of the LWO.

The minimum compensation required is as follows:

- (1) If health benefits are provided to Covered Employees and the Covered Employer's contribution for the benefits is at least \$1.50 for each hour, then the rates are as follows:
  - (a) During 2007, the greater of \$10.00 an hour or \$9.00 adjusted by the increase in the Consumer Price Index for All Urban Consumers, San Francisco/Oakland/San Jose area (1982--1984=100) from January 1, 2004, through December 31, 2006.
  - (b) For each year after 2007, the rate shall be based on the rate from the immediately preceding year adjusted by the increase in the Consumer Price Index for All Urban Consumers, San Francisco/Oakland/San Jose area (1982--1984=100) from January 1 through December 31 of the immediately preceding year.
  
- (2) If health benefits are not provided to Covered Employees or if health benefits are provided but the Covered Employer's contribution for the benefits is less than \$1.50 for each hour, then the rates are as follows:
  - (a) During 2007, the greater of \$11.50 an hour or \$10.50 adjusted by the increase in the Consumer Price Index for All Urban Consumers, San Francisco/Oakland/San Jose area (1982--1984=100) from January 1, 2004, through December 31, 2006.
  - (b) For each year after 2007, the rate shall be based on the rate from the immediately preceding year adjusted by the increase in the Consumer Price Index for All Urban Consumers, San Francisco/Oakland/San Jose area (1982--1984=100) from January 1 through December 31 of the immediately preceding year.

### **Notification to Covered Employees**

The LWO requires a Covered Employer to give each existing employee and (at the time of hire) each new employee a copy of the following written notification:

**This company may enter into a contract to perform services for the City of Sacramento. If you work on such a contract, then you are entitled to be paid a living wage for each hour so worked. For more information, see Chapter 3.58 of the Sacramento City Code, which can be viewed at [www.cityofsacramento.org](http://www.cityofsacramento.org).**

The LWO requires the above notification to be provided in each language spoken by 10% or more of the Covered Employer's workforce.

The LWO also requires a Covered Employer to inform all employees of their possible right to the federal Earned Income Credit (EIC), and to make available to those employees any forms required to secure advance EIC payments from the Covered Employer.

### **Subcontractor Compliance**

A contractor is responsible for requiring all of its subcontractors who are covered by these requirements to comply with the provisions of the LWO, by including these requirements in all subcontracts covered by the LWO.

## **Other Provisions of the LWO**

### Use of Funds Paid Under CITY Contracts

Under the LWO, Covered Employers may not directly use CITY funds to persuade Covered Employees to support or oppose unionization, and Covered Employers may not directly use CITY funds to schedule or hold meetings related to union representation during the Covered Employees' working hours. These restrictions do not apply to expenditures made during good-faith collective bargaining or to expenditures required under bona fide collective-bargaining agreements.

### No Reduction in Non-Wage Benefits

Under the LWO, Covered Employers may not fund any wage increases required by the LWO, nor shall Covered Employers otherwise respond to the enactment of the LWO, by reducing the health, insurance, pension, vacation, or other non-wage benefits of any of their employees.

### No Retaliation

The LWO prohibits a Covered Employer from taking any adverse action against a Covered Employee because the Covered Employee does any of the following: (1) exercises or asserts his or her rights under the LWO; (2) informs or assists other Covered Employees concerning their rights and the Covered Employer's obligations under the LWO; (3) complains about the Covered Employer's failure to comply with the LWO; or (4) seeks to enforce the LWO.

### No Reduction in Collective-Bargaining Wage Rates

The LWO does not require or authorize any Covered Employer to reduce wages set by a collective-bargaining agreement or required under any prevailing-wage law.

## **Violations and Monitoring**

The LWO provides that any violation of the LWO by a CITY contractor constitutes a material breach of the contract, and authorizes the CITY to terminate the contract and pursue all available legal and equitable remedies. In order to monitor compliance, the LWO authorizes the CITY to require Covered Employers to verify their compliance with the LWO by submitting certified payroll records to the CITY, and to take such other steps as may be necessary for the CITY to determine whether the requirements of the LWO have been satisfied.

The LWO also includes provisions authorizing an employee or interested person to file a judicial action against a contractor or subcontractor for violation of the LWO.

## **Declaration of Compliance**

To assure compliance with the LWO, any person or entity entering into a contract to provide Nonprofessional Services to or for the CITY, on or after March 1, 2004, is required to provide the CITY with a signed Declaration of Compliance in the form required by the CITY, prior to the CITY's execution

of the contract. The Declaration of Compliance shall be signed by a duly authorized representative of the person or entity entering into the contract, and, when accepted by the CITY, shall constitute part of the contract.

#### **Additional Information**

- For a complete description of the LWO's provisions, refer to the LWO codified at Sacramento City Code Chapter 3.58. The Sacramento City Code is available on the internet at [www.cityofsacramento.org](http://www.cityofsacramento.org).
- For more information on the LWO requirements and the CITY's LWO program, contact Procurement Services at 916-808-6240.

## EXHIBIT F

### REQUIREMENTS OF THE NON-DISCRIMINATION IN EMPLOYEE BENEFITS CODE

#### INTRODUCTION

The Sacramento Non-Discrimination In Employee Benefits Code (the "Ordinance"), codified as Sacramento City Code Chapter 3.54, prohibits City contractors from discriminating in the provision of employee benefits between employees with spouses and employees with domestic partners, and between the spouses and domestic partners of employees.

#### APPLICATION

The provisions of the Ordinance apply to any contract or agreement (as defined below), between a Contractor and the City of Sacramento, in an amount exceeding \$100,000.00. The Ordinance applies to that portion of a contractor's operations that occur: (i) within the City of Sacramento; (ii) on real property outside the City of Sacramento if the property is owned by the City or if the City has a right to occupy the property; or (iii) at any location where a significant amount of work related to a City contract is being performed.

The Ordinance does not apply: to subcontractors or subcontracts of any Contractor or contractors; to transactions entered into pursuant to cooperative purchasing agreements approved by the Sacramento City Council; to legal contracts of other governmental jurisdictions or public agencies without separate competitive bidding by the City; where the requirements of the ordinance will violate or are inconsistent with the terms or conditions of a grant, subvention or agreement with a public agency or the instructions of an authorized representative of any such agency with respect to any such grant, subvention or agreement; to permits for excavation or street construction; or to agreements for the use of City right-of-way where a contracting utility has the power of eminent domain.

#### DEFINITIONS

As set forth in the Ordinance, the following definitions apply:

"Contract" means an agreement for public works or improvements to be performed, or for goods or services to be purchased or grants to be provided, at the expense of the City or to be paid out of moneys deposited in the treasury or out of the trust money under the control or collected by the City. "Contract" also means a written agreement for the exclusive use ("exclusive use" means the right to use or occupy real property to the exclusion of others, other than the right reserved by the fee owner) or occupancy of real property for a term exceeding 29 days in any calendar year, whether by singular or cumulative instrument, (i) for the operation or use by others of real property owned or controlled by the City for the operation of a business, social, or other establishment or organization, including leases, concessions, franchises and easements, or (ii) for the City's use or occupancy of real property owned by others, including leases, concessions, franchises and easements.

"Contract" shall not include: a revocable at-will use or encroachment permit for the use of or encroachment on City property regardless of the ultimate duration of such permit; excavation, street construction or street use permits; agreements for the use of City right-of-way where a contracting utility has the power of eminent domain; or agreements governing the use of City property that constitute a

public forum for activities that are primarily for the purpose of espousing or advocating causes or ideas and that are generally protected by the First Amendment to the United States Constitution or that are primarily recreational in nature.

“Contractor” means any person or persons, firm, partnership, corporation, company, or combination thereof, that enters into a Contract with the City. “Contractor” does not include a public entity.

“Domestic Partner” means any person who has a currently registered domestic partnership with a governmental entity pursuant to state or local law authorizing the registration.

“Employee Benefits” means bereavement leave; disability, life, and other types of insurance; family medical leave; health benefits; membership or membership discounts; moving expenses; pension and retirement benefits; vacation; travel benefits; and any other benefit given to employees. “Employee benefits” shall not include benefits to the extent that the application of the requirements of this chapter to such benefits may be preempted by federal or state.

### **CONTRACTOR’S OBLIGATION TO PROVIDE THE CITY WITH DOCUMENTATION AND INFORMATION**

Contractor shall provide the City with documentation and information verifying its compliance with the requirements of the Ordinance within ten (10) days of receipt of a request from the City. Contractors shall keep accurate payroll records, showing, for each City Contract, the employee’s name, address, Social Security number, work classification, straight time pay rate, overtime pay rate, overtime hours worked, status and exemptions, and benefits for each day and pay period that the employee works on the City Contract. Each request for payroll records shall be accompanied by an affidavit to be completed and returned by the Contractor, as stated, attesting that the information contained in the payroll records is true and correct, and that the Contractor has complied with the requirements of the Ordinance. A violation of the Ordinance or noncompliance with the requirements of the Ordinance shall constitute a breach of contract.

### **EMPLOYER COMPLIANCE CERTIFICATE AND NOTICE REQUIREMENTS**

(a) All contractors seeking a Contract subject to the Ordinance shall submit a completed Declaration of Compliance Form, signed by an authorized representative, with each proposal, bid or application. The Declaration of Compliance shall be made a part of the executed contract, and will be made available for public inspection and copying during regular business hours.

(b) The Contractor shall give each existing employee working directing on a City contract, and (at the time of hire), each new employee, a copy of the notification provided as Attachment “A.”

(c) Contractor shall post, in a place visible to all employees, a copy of the notice provided as Attachment “B.”

Attachment A



**YOUR RIGHTS UNDER THE CITY OF SACRAMENTO'S NON-DISCRIMINATION IN EMPLOYEE BENEFITS CODE**

On ..... (date), your employer (the "Employer") entered into a contract with the City of Sacramento (the "City") for ..... (contract details), and as a condition of that contract, agreed to abide by the requirements of the City's Non-Discrimination In Employee Benefits Code (Sacramento City Code Section 3.54).

The Ordinance does not require the Employer to provide employee benefits. The Ordinance does require that if certain employee benefits are provided by the Employer, that those benefits be provided without discrimination between employees with spouses and employees with domestic partners, and without discrimination between the spouse or domestic partner of employees.

The Ordinance covers any employee working on the specific contract referenced above, but only for the period of time while those employees are actually working on this specific contract.

The included employee benefits are:

- Bereavement leave
- Disability, life and other types of insurance
- Family medical leave
- Health benefits
- Membership or membership discounts
- Moving expenses
- Pension and retirement benefits
- Vacation
- Travel benefits
- Any other benefits given to employees

(Employee Benefits does not include benefits that may be preempted by federal or state law.)

If you feel you have been discriminated or retaliated against by your employer in the terms and conditions of your application for employment, or in your employment, or in the application of these employee benefits, because of your status as an applicant or as an employee protected by the Ordinance, or because you reported a violation of the Ordinance, and after having exhausted all remedies with your employer,

**You May . . .**

- Submit a written complaint to the City of Sacramento, Contract Services Unit, containing the details of the alleged violation. The address is:

City of Sacramento  
Procurement Services Division  
915 I Street, Second Floor  
Sacramento, CA 95814

- Bring an action in the appropriate division of the Superior Court of the State of California against the Employer and obtain the following remedies:

- Reinstatement, injunctive relief, compensatory damages and punitive damages
- Reasonable attorney's fees and costs



**YOUR RIGHTS UNDER THE CITY OF SACRAMENTO'S NON-DISCRIMINATION IN EMPLOYEE BENEFITS CODE**

If your employer provides employee benefits, they must be provided to those employees working on a City of Sacramento contract without discriminating between employees with spouses and employees with domestic partners.

The included employee benefits are:

- Bereavement leave
- Disability, life and other types of insurance
- Family medical leave
- Health benefits
- Membership or membership discounts
- Moving expenses
- Pension and retirement benefits
- Vacation
- Travel benefits
- Any other benefits given to Employees

If you feel you have been discriminated against by your employer . . .

**You May . . .**

- Submit a written complaint to the City of Sacramento, Contract Services Unit, containing the details of the alleged violation. The address is:

City of Sacramento  
Procurement Services Division  
915 I Street, Second Floor  
Sacramento, CA 95814

- Bring an action in the appropriate division of the Superior Court of the State of California against the employer and obtain reinstatement, injunctive relief, compensatory damages, punitive damages and reasonable attorney's fees and costs.

**Discrimination and Retaliation Prohibited.**

If you feel you have been discriminated or retaliated against by your employer in the terms and conditions of your application for employment, or in your employment, because of your status as an applicant or as an employee protected by the Ordinance, or because you reported a violation of this Ordinance . . .

**You May Also . . .**

Submit a written complaint to the City of Sacramento, Contract Services Unit, at the same address, containing the details of the alleged violation.